ACCESSIBILITY RIGHTS FOR DISABLED PEOPLE

by

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The term "accessibility rights" refers to the right of disabled people to benefit from the provision of goods and services generally available to the public without discrimination because of physical disability caused by providing the services from a location which people cannot physically access.

Historically, disabled people in Canada have been stigmatized and marginalized. This social position has been changing since the disabled consumer movement arose and placed disability rights on the political agenda. Current official policy is to integrate disabled people into all aspects of society. A major barrier to this policy is the failure to effectively implement accessibility rights. This thesis examines the nature of accessibility rights and their legal protection and offers proposals for improving the implementation of these rights.

The major sources of legal protection for the rights of disabled people are human rights statutes and the Charter of Rights. For this reason these laws are considered in detail to determine how effectively they protect accessibility rights.

This thesis concludes that the current protections are inadequate and fundamentally incapable of guaranteeing accessibility rights. Three proposals for improvements are made. First, legislatures should set out detailed policy directions for the implementation of these rights. Second, the agencies which impact on the implementation of accessibility rights should be required to coordinate their activities to ensure that the work of each agency complements that of the others. Third, three new implementation strategies should be adopted.

First, self-regulating professions should adopt into their professional standards a duty to implement the principles of barrier free design into every aspect of their professional activities. Second, existing regulatory agencies should have their responsibilities and powers augmented so they assume a greater role in the enforcement:
of accessibility rights. Third, human rights legislation should be amended to add a regulatory enforcement strategy to the existing complaints based strategy. This additional strategy should be based on the concept of adaptation planning. This concept would allow for the orderly and cost-effective transformation of the physical structure of society so that disabled people no longer experience discrimination in the provision of services due to physical barriers.
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I. INTRODUCTION:

Canadian human rights legislation and the *Charter of Rights and Freedoms*\(^1\) guarantee physically disabled people the right to be free from discrimination in employment, residential accommodation, and the provision of goods, services, facilities, and accommodations available to the public. Discrimination against disabled people takes many forms. An employer discriminates against a man who uses a wheelchair when it refuses to hire him because the employer believes that the appearance of a man dependent on a wheelchair will reflect poorly on its business image.\(^2\) A landlord discriminates against a prospective tenant whose sole source of income is a disability pension when he refuses to rent to anyone who does not have employment income.\(^3\) A hospital which refuses to allow a seeing eye dog on the premises discriminates against a blind person who uses that assistive aid even if the hospital allows the person on the premises without the dog.\(^4\) A social club discriminates against a member who uses a wheelchair when it refuses to allow that person to take part in a social dance.\(^5\) An interprovincial bus company discriminates against disabled people when it fails to provide buses which are designed to board and transport people who use wheelchairs.\(^6\)

In this thesis I examine in detail one manifestation of discrimination against physically disabled people -- physical barriers to the equal use of and benefit from services provided to the public. The right to physical access is a somewhat awkward and

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6. *Ralston v. Greyhound Lines of Canada*, Canadian Human Rights Commission decision, April, 1994. In this conciliated settlement Greyhound agreed to provide ten buses which are designed to board and transport people who use wheelchairs. These buses will be used on a number of interprovincial runs and passengers will need to reserve one day in advance of the trip.
ambiguous term. The word "accessibility" has a number of meanings but I think that, in the context of discussions about discrimination and services, the phrase "accessibility rights" is sufficiently clear to describe the general concept that physically disabled people should not be prevented from using, and obtaining an equal benefit from, services solely because of a physical barrier. I use the term "accessibility rights" to mean the right to use, and obtain an equal benefit from, the provisions of goods, services, facilities, and accommodations generally available to the public without discrimination because of physical disability caused by providing the services from a location, or in a manner, which people cannot use because of their disability.

For ease of reading, I will be using the term "services" to include goods, services, facilities, and accommodations generally available to the public unless the context requires otherwise.

A physical barrier which prevents a person from using or benefiting from a service may be a set of steps into the building from which the service is delivered, lack of visual information displays so deaf people can understand public address system announcements, the failure to provide written information in alternate formats so blind people can use the information in the same way as sighted literate people, or the use of inaccessible buses by a public transportation company.

A physical barrier arises from the interaction of an individual and the environment. Most people are not physically disabled and the world has been designed to meet the physical capacities of these people.

Because accessibility is a combination of the environment and the person it is often difficult for people to recognize a barrier that they do not experience. It also means that people working to improve accessibility rights frequently succeed only in "getting it almost right". For example, there is a ramp leading from the UBC Faculty Club parking lot to the building. A visitor is enticed up the ramp to find a six inch curb at the top! Or, most corners in downtown Vancouver have curb cuts. However, to cross on a green light one
frequently has to go down a curb cut into the moving traffic lane to get to the cross walk because there is only one curb cut to go in both directions. A wheelchair requires a space about four feet square which means that half the traffic lane is required to use the curb cut. The planners in both these cases no doubt did their best but did not quite get it right. A professional discipline most commonly referred to as "barrier free design" is being developed because of the difficulty of planning for accessibility rights. Implementation of accessibility rights requires both appropriate technical knowledge and enforcement schemes.

Accessibility rights, despite the Charter and human rights legislation, are still more honoured in the breach - accessibility is still the exception not the rule. This claim is supported by the results of studies on accessibility conducted by the Canadian Human Rights Commission. Although these studies were limited in their scope they illustrate what can be observed by a person going about his/her daily business and noting every time a step is encountered, an elevator is found without braille or raised numbers, or important information is given over a public address system. The fact that there is no comprehensive data base to measure improvements in accessibility since human rights legislation came into effect is itself perhaps a measure of how much accessibility rights are on the current agenda of governments and private business. The current processes for enforcing accessibility rights have proven themselves ineffective despite the remarkable progress that has been made in the last several years. The disabled consumer advocacy groups have chosen to use the legislation to support their efforts in political arenas to press for action on accessibility. That this is so says something about how effective the legal enforcement processes are believed to be. In Canadian Paraplegic Association v. Canada (Elections Canada)(No. 2) a number of complainants alleged that their accessibility rights had been infringed when Elections Canada failed to ensure that their polling stations for the

1984 federal election were accessible. While this case was moving through the human rights enforcement process the CPA was also applying pressure on the government to amend the *Elections Act* to guarantee accessible polling stations. By the time a decision was handed down in the case a Royal Commission had completed its work, another election had gone by, and the *Elections Act* had been amended. Furthermore, the complaints of four of the individuals involved in the case were dismissed even though the polling stations those people were assigned to were not accessible. Although the *Charter* also guarantees equality rights for disabled people, nine years after the equality section of the *Charter* came into force there have been no cases directly on the issue of accessibility rights. The purpose of this thesis is to propose some ways to improve the implementation of accessibility rights.

This thesis begins with a discussion of the relationship between disability and society. In order to understand the life circumstances of a disabled person it is necessary not only to understand the physical condition itself but also society’s response to disability. It is the interaction of the physical condition and the individual’s and society’s response to that condition that defines and constrains the life circumstances of disabled people. Disability is a social construct as much as a physical condition. The functional effects of disability, even one with the same medical description, can very widely. In chapter II, I briefly review the social construct of disability, some of the statistical indicators of the variety of functional limitations experienced by disabled people, and the social consequences of the barriers experienced by disabled people. In planning for accessibility rights it is vitally important to remember that disabled people are as variable as any other group and this variation must be considered when taking action to augment accessibility rights.

The law says disabled people have the right to equality and freedom from discrimination. In chapter III, I review the nature of equality and discuss how the concept’s elastic properties permit a wide range of interpretations. I will show the
weaknesses in the traditional concept of formal equality and argue that the notion of substantive equality is a more appropriate framework for implementing the concept of equality in Canadian society. However, even that concept does not automatically determine the most appropriate public policies to advance the interests of disabled people. Disabled people are not a homogenous group. Different people have different ideas of how to implement equality and the implementation of accessibility rights is similarly subject to debate on how it should be done. I briefly discuss four approaches to equality for disabled people, placing the most emphasise on the full integration approach which has become the foundation for current official policy and which, in my opinion, is the most suitable policy choice. I end this chapter with a discussion of the limitations to equality claims. These limitations are reflected in human rights legislation and the Charter which I consider in detail in chapters V and VI.

In chapter IV, I explore the current official policy towards disabled people. Today, as a general rule, the concept of full integration of disabled people is the official policy. However, what this means in practice, how it has been implemented in daily life, and whether full integration answers the equality needs of disabled people are all questions upon which society has not yet reached any consensus. I briefly review the development of this ideology in the fields of mental health and education and then show how it has permeated into other institutions. Implementation of the new policy has been extremely slow. I briefly explore the theoretical reasons for this glacial pace of change. This subject is not only of interest to students of politics. In devising proposals for change to the current system of implementing accessibility rights I have taken into account the impediments to implementing a change in public policy which I discuss in this chapter. Chapter IV closes with a recognition of the need for disability consumer group political advocacy. Disadvantaged groups have always had to lead their own struggles for equality. While the rest of society can help or hinder, it will not do anything for disabled people unless disabled people place themselves on the political agenda and vigorously
lobby for actions they want taken to benefit themselves.

Human rights legislation in all Canadian jurisdictions prohibits, *inter alia*,
discrimination against disabled people. Chapter V examines this legislation in some detail
with the emphasis on accessibility rights. I review the concept of discrimination (which
has changed over time), the definitions of disability and services, the defences built into
the legislation, and scope of the remedies available under that legislation. Human rights
legislation is a major tool to advance the interests of disabled people and it cannot be
denied that many people have benefited from it both directly and indirectly. However,
there are a number of weaknesses in the legislation which goes a long way to explaining
why human rights commissions have been so ineffective at enforcing accessibility rights.
This chapter ends with a discussion of these problems.

The *Charter of Rights and Freedoms* is widely seen as another major tool to
enforce accessibility rights. Chapter VI examines the *Charter* but, because there is almost
no jurisprudence relating to accessibility rights, from a somewhat theoretical perspective.
I review the general principles of interpretation, the scope of the *Charter*, and the equality
rights section. As with human rights legislation, the *Charter* includes provisions, found
in s. 1, for limiting the scope of the rights it guarantees. I examine this section closely
because it is particularly in relation to the courts' interpretation of s. 1 that I see
significant problems with successfully using the *Charter* in the context of accessibility
rights. The courts have extremely wide remedial powers to enforce Charter rights. I
discuss only two remedial options because, in my view, they are the most problematic for
accessibility rights enforcement and because of the close relationship with principles
reflected in the interpretation of s. 1. The concerns about the effectiveness of the *Charter*
because of the interpretation of s. 1 are equally applicable to the principles which apply
to remedies. As will be seen, there is significant overlap between human rights legislation
and the *Charter*. This chapter finishes with a discussion of the overlap and some of the
factors which may incline a person to choose one avenue of remedy over of the other.
Federal United States legislation has prohibited discrimination against disabled people since 1973. There are many federal U.S. statutes that implement aspects of American public policy related to disabled people. I have selected only three for review and have structured my review around the themes of implementation by financial control, contract, and prescription. These statutes, the Rehabilitation Act, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act, 1990, are often held up by Canadians as models which should be substantially followed in Canada. I examine these Acts in detail in chapter VII because of their notoriety and because Canadians have a very limited appreciation of exactly what they do and how they do it. Although I will be adopting some of their principles in my proposals for change, they do not contain a panacea for disabled people in Canada. To show that these models have their own limitations and weaknesses I conclude the chapter with a brief summary of the results of two studies on the effectiveness of American disability legislation.

In the 1970s many disabled consumer groups began to use a "rights" argument to convince legislators to add disability as a prohibited ground of discrimination to human rights legislation. Building on that base, political action lead to the inclusion of disability in the equality rights section of the Charter. By 1985 mental and physical disability were included in all human rights legislation as prohibited grounds of discrimination. To date there has been very little jurisprudence in the area of accessibility rights. There has, however, been significant improvement in accessibility in many parts of Canada. Disabled consumer groups have used the legislation as part of a political strategy much more than as part of a legal strategy. This conscious political decision has been strongly influenced by the inherent limitations and inefficiencies of the human rights and Charter enforcement.
ment processes. In spite of the gains made by this approach, implementation of accessibility rights is still too slow.

In the final chapter I propose a number of changes to improve the effectiveness of the implementation of accessibility rights. These measures, each of which on its own would improve implementation although they would be more effective if implemented together, are the promulgation of clear standards for accessibility, the coordination of the activities of agencies which impact on accessibility rights, and the adoption of three additional enforcement strategies.

Through human rights legislation the legislators have adopted a public policy of non-discrimination in relation to disabled people subject only to a *bona fide* justification defence. They have failed to provide any more guidance on how this policy is to be implemented and this has contributed to the continuation of the denial of accessibility rights. The legislators should establish a set of operating principles to direct the interpretation of this policy so the regulators and the regulated know what is required by the law.

The various agencies which have an impact on accessibility rights should be required to coordinate their activities so that the work of each agency complements that of the others. This requirement for coordination applies to each of the three stages of policy implementation, which are policy refinement, diffusion, and execution.

The most effective way to implement accessibility rights is to prevent barriers before they are in place. I propose to place a clear duty of care on self-regulating professions, such as architects, transportation engineers, designers, and others who design our structures and machines to hold them accountable within their professions and in law for negligently failing to implement barrier free design in all their work. This duty would place accessibility rights on the agenda from the first day of planning and would distribute the cost for remedying problems among the people responsible for the problem in the first place.
Institutions which regulate various industries such as transportation and
collection should be the primary enforcement agencies for accessibility rights. These
institutions are already familiar with the numerous systems which affect their industries
and are in a position to establish and enforce accessibility standards in the ordinary course
of their duties. Because they have input to every system which makes up their industry
they can identify and remedy potential accessibility problems even before individuals
experience a discriminatory act.

To deal with the enormous stock of inaccessible structures and vehicles which
currently exist I propose that a system of mandatory adaptation planning be established
to complement the current enforcement strategy contained in human rights legislation.
While adaptation planning is properly criticized as an exception to the general rule of non-
discrimination, and in principle the cost of implementing a person's fundamental human
rights should not be an excuse to deny those rights, human rights legislation and the
Charter are influenced by the cost of remedial action. Furthermore, the political climate
of today, and the foreseeable future, is strongly influenced by fears that the various
government deficits so threaten our survival that they must be tamed at almost any cost.
The accessibility barriers in the existing physical stock of buildings and vehicles will not
be corrected quickly or in an orderly and managed fashion using the currently existing
implementation tools. I propose an adaptation planning scheme as a mechanism to
implement a public policy of full integration of disabled people in a coherent and managed
way so that the most people benefit the most quickly and the costs are shared widely by
the whole society.
II. THE SOCIAL CONSTRUCT OF DISABILITY:

This chapter deals with the question of who the disabled are. I begin with an examination of disability as a social construct and the complexity of the group labelled "disabled". The problem of defining who is disabled is complex and continually evolving in part because a number of social benefits derive from being labelled disabled, the nature of disabling conditions is seen to change (e.g., the concept of learning disability is expanding), and all definitions contain inherent uncertainties. The question of terminology is important because words have an influence on attitudes, which in turn influence the role and status of disabled people in society. After presenting some statistics about the population of disabled people, the social standing of disabled people will be reviewed. I will examine society's traditional attitudes toward disabled people and how those attitudes create barriers to equality for disabled people as much as the real limitations caused by the disability itself. Finally, some of the economic consequences of disability will be examined.

A. Who are the Disabled?

i. Definitions:

The United Nations Declaration on the Rights of Disabled Persons defines a disabled person as:

Any person unable to ensure by himself or herself wholly or partly the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities.1

The World Health Organization distinguishes 'impairment', 'disability', and

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'handicap'. An 'impairment', whether permanent or temporary, includes any "disturbance or interference with the normal structure and functioning of the body, including mental function". A 'disability' is "the loss or reduction of functional ability and activity that is consequent upon impairment". A "handicap is the disadvantage that is consequent upon impairment and disability". Thus an impairment may or may not cause a disability which in turn may or may not result in a handicap. The extent to which a disability handicaps a person is a function of the social reaction to the disability and how society is structured to maximize the ability of people to pursue their interests and aspirations, as well as the nature of the disability itself.

Since a number of social and economic benefits, as well as detriments, arise from being labelled disabled, definition is an ongoing problem. Definitions and methods of measuring disability and its functional consequences depend on who is making the determination and for what purpose. For example, many statistical surveys done by government agencies use a self-identification system. For pensions, workers’ compensation, or veterans’ benefits a restrictive medical definition may be applied to control access to the benefits. For vocational rehabilitation programs rehabilitative prospects will be determinative. For admission to (or exclusion from) public schools a medical model may be used. For some of these programs there are benefits for the individual in seeming as disabled and unproductive as possible; for others, the individual will benefit from appearing less disabled.

Three factors should be considered when determining whether a person is disabled and the degree to which that person is disabled (or, using the WHO definitions, handicapped). 1) The person must have a mental or physical impairment. The presence of a mental or physical impairment has been traditionally determined by the medical

profession but increasingly others, such as psychologists, educators, and social workers, are now involved in this determination. A complication inherent in the WHO definition of impairment is that it is dependent on a concept of the normal physical and mental structure and functioning of the body. Especially with mental processes, the concept of 'normal' is, to a great extent, defined by the society in which the individual lives. And what is considered 'normal' changes over time. 2) The impairment must result in a functional limitation which must be seen as negative (neutral or advantageous variations from the norm are not disabilities). 3) The functional limitation must be an impediment to activities in which the person would want to engage. This is, to some extent, a circular argument because if a person can not do something, his/her interest in doing it will be affected by the inability. Regardless, a functional limitation of a major life activity such as seeing, hearing, walking, etc. is a disability which has an adverse effect on achieving 'life success'. The extent to which a disability adversely affects the achievement of life success is a measure of the impairment itself and its related functional limitations, the individual's response to these limitations, society's capacity to include a person with such an impairment, and the person's and society's determination of how to measure 'life success'. Some elements of life success to consider are employment, housing, reproduction, contribution to society, and the pursuit of happiness.4

Determining whether a person is disabled for the purposes of entitlement to a particular benefit may be done in a number of ways. 1) One could make a list of all known physical and mental impairments recognized by the medical profession. Since such a list could easily become so complex as to be effectively unusable, the list maker would have to arbitrarily limit the endless possible modifiers used to describe variations on the basic impairment. However, having made the list, a person's entitlement to benefit from

any particular program could then be determined by identifying those impairments on the list which the program administrators would accept as an acceptable qualification for participation in the program. This approach requires that an authority acceptable to the program administrators (usually a medical professional) declare the person has the necessary impairment. If the person is deemed to have the necessary impairment then that person can make use of the program. 2) Or, one could gear the definition to the purpose to be achieved. For example, to determine eligibility for a sign interpreter a person could be deemed to be eligible if he/she needed an interpreter to understand speech. The medical reason for the need would not be considered, only the fact that the person could not communicate in the context without the interpreter. The difference between this option and the previous one is that there is no need to fit into one of the listed impairments. If a sign interpreter allowed a person to understand the spoken words when that would otherwise not be possible, then the person is entitled to the interpreter. 3) Alternatively, one could defer to professional opinion. In this case, there is no list and no reference to actual need in the real world. If the authority acceptable to the program administrators says an applicant needs a sign interpreter that is enough to obtain one from the program. 4) As another alternative, one could attempt to describe the qualifying disability by establishing a definition within the context of the program authorizing instrument. This option, of course, takes us back to the original problem of trying to devise a suitable definition of the types of impairment and their degree which a person must have to qualify for the program’s benefits.

There is, then, no objective external measure of disability. It is always a question of disabled for what purpose.5

Human group labelling is a continually evolving process. Generally, any label describing a thing society considers a negative attribute comes to have a negative social

connotation. To avoid the negative connotation an interest group selects a new label which soon enters mainstream usage. This usage then picks up a negative connotation and so a new label is selected and the process continues. Generally, with each change of label, there will be a reduction or elimination of some negative stereotype associated with the label. "The power of words to affect people’s lives by subtly influencing their conceptions of reality, emotional associations, and self-concepts should not be underestimated."  

There is limited consensus on the appropriate term to use when discussing disabled people. While it is recognized that as between 'handicap' and 'disability' one term refers to a medical condition and the other to the social consequences of that condition, disability groups are not in agreement about which is which. Etymologically a handicap refers to a physical or mental impairment - from the concept of weighting, or adding a burden, to make the doing, or achieving, of something more difficult - while disability comes from 'dis-ability', or 'not able' to do something. Thus, a person whose lower leg has been amputated but who runs and jogs with the use of a prosthesis is not 'dis-abled' from running and jogging but does have a handicap.

The use of the word 'disabled' as a noun to refer to individuals is generally rejected. A number of community groups use the term 'handicapped' either as a noun or an adjective with the noun 'people'. However, presently this term is widely disapproved of and its retention in the names of groups is a matter of not changing a name selected when the word was considered acceptable. Phrases such as 'differently abled' and 'physically (or mentally) challenged' are used but are not widely preferred. Their use has not really caught on. In the field of education the phrases 'educationally challenged' and 'exceptional children' or 'children with exceptionalities' are used. On the other hand, phrases such as 'people with disabilities', 'students with disabilities', or 'travellers with

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disabilities' are coming into more frequent use. Today in Canada the greatest degree of consensus can probably be gained for the use of the word 'disability' and its derivatives to describe mental or physical impairments that result in limitations to functional ability and the phrase 'disabled people' to refer to people who have disabilities. The use of 'disabled' as an adjective emphasizes that the person is a person first and incidentally disabled. These are the terms that will be used in this thesis. 

ii. Disability as Social Construct:

Many writers have described how the life options of disabled people are limited by society’s response to the disability as much as, if not more than, by the limitations imposed by the condition itself. A disability exists not merely as a medical pathology but as a complex combination of medical condition, individual response, social stigma, and a society designed for the statistically average person. "... Much of the inability to function that characterizes physically impaired people is an outcome of political and social decisions rather than medical limitation." 

The independent-living movement offers a radically different view of the problem of disability and its solution. According to representatives of the movement, the problem of disability is one not only of physical impairment but also of unnecessary dependence on relatives and professionals, of architectural barriers, and of unprotected rights. In this view the pathology is not in the individual, as the medical model would suggest, but rather in the physical, social, political and economic environment that has up to now limited the choices available to people with disabilities. The solution to these problems is not more professional intervention but more self-help initiatives leading to the removal of barriers and to the full participation of disabled people in society.

8. For a vigorous rejection of the use of the term 'disabled' see Wolf Wolfensberger, The Case Against the Use of the Term 'Disability'; in Spiegel, supra, fn. 4, p. 27. His argument is based on the etymology of the word and the social consequences of its use in the past.

9. See generally Claire H. Liachowitz, Disability as a Social Construct: Legislative Roots, p. xi, tenBroek, supra, fn. 3, Burgdorf, supra, fn. 4, and Rioux, supra, fn. 5.

The Social Construct of Disability

Jacobus tenBroek views disability in the following terms:

For the most part it is the cultural definition of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security. Thus a meaningful distinction may be made between 'disability' and 'handicap' - that is, between the 'physical disability', measured in objective scientific terms and the 'social handicap' imposed upon the disabled by the cultural definition of their estate.\(^{11}\)

The concept of disability as a social construct merges the notions of physical or mental 'disability' as a medical pathology and 'disability' as a social category which limits life options because society erects barriers to individual choice. It is another way of distinguishing the older terms 'disability', used to refer to the functional limitations resulting from the medical condition, and 'handicap', used to refer to the way society reacts to that condition. Some writers have coined the term 'handicapism' to explain the status of disabled people in society.

[Handicapism's] causes are the socially learned attitudes, preconceptions, and misunderstandings of the able-bodied; the denial of usual rights and responsibilities of other members of society; the stigma attached to disability; the expectation that disabled persons have no future in normal social life; and the inaccessibility of the labour force and the benefits that come from that.\(^{12}\)

Handicapism has also been used as a paradigm to find linkages between the way disabled people have been marginalized as women and racial minorities have been. It emphasizes the way factors not related to the medical condition limit the life options of disabled people.

The concept of handicapism is a paradigm through which to understand the social experience of those who have previously been known as mentally ill, mentally retarded, deaf, crippled, alcoholic, addict, elderly, deformed, deviant, abnormal, disabled, and handicapped. Handicapism has many parallels to racism and sexism. We define it as a set of assumptions and practices that promote the differential and unequal treatment of people because of apparent or assumed physical, mental, or behavioral differences.\(^{13}\)

The concept of 'handicap' or 'handicapism' is an important tool to identify how

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barriers erected by society magnify functional limitations on career and life options imposed by various disabling conditions. Some have taken this to the extreme of suggesting that without the (socially imposed) handicap the person is not even disabled.

As part of a political process to make the argument that social barriers should not magnify the restrictions on career and life options imposed by disabilities this position may have some validity. But some people do have severely limiting medical conditions. In my view, adopting a position which attempts to deny these facts will undermine the political arguments in favour of changes in public policy which are required to eliminate the existing social barriers faced by disabled people.

iii. Group Identity:

The concept that disabled people as a whole have common characteristics which create common group interests is relatively recent. However, it was only after this idea was accepted, and disabled people formed groups based on the idea that there is a group interest that transcends interests arising from particular disabilities, that disabled people were able to achieve significant changes in public policies affecting their interests.

There are a number of reasons why the formation of groups which include people with various kinds of disability, organized on the idea that there are common group interests, arose only recently, beginning in the early 1970s.

First, the types of disabling conditions are diverse. Disability may arise from the chance combination of genetic material, events during the development of the fetus, disease, accident, or war. There is a tendency to see the particular condition as the group unifying factor. Organizations based on particular disabilities concentrated on improving services for the people with those disabilities. Historically, disabled people have had groups form to deal with them, or themselves formed groups, based on the particular disability. While other self-identifying groups such as women, blacks, or aboriginal
peoples were identifying common interests transcending their diversity, groups concerned
with particular disabilities were concentrating on their own particular concerns. The
diversity of disabilities was emphasized over the identification of common group interests.

Second, for the great majority of disabling conditions the functional consequences
of the disability vary widely. It is often difficult for a person to classify him/herself as a
disabled or non-disabled person. A person might be of the group 'disabled' for some
purposes but not for other purposes. A person’s functional limitations may change
depending on the role then being acted out. Shifting perceptions as to whether one is
disabled make recruitment to groups interested in particular disabilities difficult enough
without the added problem of recognizing inter-group common interests. The negative
attitude towards disabled people is frequently held by disabled people themselves. Some
come to reject the negative image while others do not. This creates a tendency among
many disabled people to segregate themselves from other disabled people as well as from
society at large. 14

Third, for severely disabled individuals, at whatever age their disability arose, there
is the problem of isolation. Historically they disappeared from the ordinary work-a-day
world. Segregated and invisible, they could then be ignored as the rest of the world went
on about its business, leaving the care of these individuals in the hands of professionals.
They were not encouraged to speak for themselves or make demands on the care giving
system. Segregation from society was also segregation from each other.

Fourth, disabled people come from all other groups in society, be those groups
characterized by sex, race, national or ethnic origin, religion, age, or any number of other
characteristics. This diversity of origins of the group 'disabled' has meant that the bonds
that tie individuals to the group 'disabled' are generally much weaker than the ties binding

14. Diane Driedger, Organizing for Change: A History of the Manitoba League of the Physically
Handicapped, p. 4. See also Myron G. Eisenberg, Disability as Stigma, in Eisenberg et al, supra, fn.
11, pp 7 - 11.
them to their origin, or source, groups. Until recently, the fact of disability alone did not seem to be enough to identify a unity of interest, to allow disabled people to see themselves as a distinct group with common group interests.

Fifth, only recently have major advances in medical and rehabilitative science and technologies provided effective aids to disabled people which have increased their ability to get out in the community and to control their own lives. Only when out in the community, and able to communicate, did disabled people begin to find themselves and talk about their common experiences.

Sixth, there are more disabled people and more in different age groups than in the past. Disabled people are no longer just children who die young or elderly people waiting to die. As well as war, the modern industrial state causes injury to working age adults and modern medicine keeps them alive. These people were out in the community and there became enough of them to find each other and compare experiences and future aspirations. They were used to adult independence and wanted to maintain as much of that independence as possible. The traditional paradigms of disabled people did not accommodate their interests.  

The characteristic common to disabled people has been, historically, that disabled people have been neglected, silenced and invalidated. The unifying factor is social exclusion because of functional limitations or stigmatization. This unifying factor is also the reason that it has been a difficult and slow process to develop the idea that disability alone is enough to create a common interest.

As disabled people began to develop a group consciousness they began to formulate theories about their role in society, to demand the right to speak for themselves,
and to recognize how their oppression has similarities to that of other socially disadvantaged groups. As group consciousness grows, disabled people will become even more vocal in asserting their rights and their claims of right. Their silence will end.

Viewing disabled people as a coherent group with common group interests must not be allowed to mask the real differences in needs, desires, and interests of particular individuals. The wide divergence of causes and types of disability leads to a complex diversity of interests within the disabled community. Not all disabled people or groups want the same thing or have the same vision of society.

Generalizations that may be made about other disadvantaged groups, which may be legitimately articulated to identify commonalities of interest and assist in developing a useful model to assist in counteracting the disadvantages experienced by them, are seldom relevant to the disabled community because of the enormous range of disabilities and personal and social reactions to them. Additionally, individual disabled people come from different communities. The interests the person has in that source community do not disappear. Individuals should not have to give up their interests arising from membership in other groups just because they become disabled. Disabled women, disabled aboriginal people, disabled blacks, etc., have multiple group interests. Disabled people who are also members of another disadvantaged group may experience discrimination by other members of their source group as well as experiencing a double victimization based on their disability and their membership in the source group.

iv. Some Statistics:

In Obstacles, the 1981 report of the House of Commons Special Committee on the Disabled and the Handicapped, the lack of a population based data base dealing with disabled people was identified as a significant impediment to alleviating their social and economic problems. The Committee recommended that Statistics Canada give high
priority to the development of such a data base.18

Responding to this recommendation, Statistics Canada undertook a wide ranging survey of disabled Canadians as a supplement to the Canadian Labour Force Survey conducted in October 1983 and June 1984 (the CHD Survey).19 This survey covered the population over the age of 15 living in households, excluding residents of the Territories, Indian Reserves, the Armed Forces, and institutions which provide medical, rehabilitative, or palliative care. The survey dealt with physical disabilities and developmental and learning disabilities (but not mental illness). The survey collected data about disability in relation to age, province of residence, type and severity of disability, limitations on activities (such as travelling, self care, etc.), and participation in the labour force.

Statistics Canada undertook another wide ranging survey, the Health and Activities Limitation Survey (the 1986-87 HAL Survey), as part of its efforts to develop a thorough data base on disability issues, in the fall of 1986 (for residents of households) and the spring of 1987 (for residents of institutions).20 The survey sample was taken from the population of respondents to the 1986 Census who reported they were limited in the kind or amount of activity they could do because of a "long term physical condition, mental condition, or health problem".21 Data was gathered for all disabilities including learning disabilities, emotional or psychiatric disabilities, and developmental delay disabilities, except mental illness among children under the age of 14 years. Another HAL Survey was taken in 1991 following the 1990 Census.22

All the surveys used the WHO definition of disability. Adults, but not children under the age of 14, who reported that the use of an assistive aid completely eliminated

18. Obstacles, p. 131.
22. Only the reports dealing with the disabled population by age and sex and severity of disability have been published to date.
the functional limitation (eg. the use of a hearing aid) were not counted as disabled. Children were considered disabled if they had any general limitation such as hearing, speaking, or vision problems, or if they used a technical aid.

These three surveys are the only comprehensive surveys of disabled Canadians. However, since they surveyed different segments of the population, used different survey questionnaires, and collected slightly different data (there being greater differences between the CHD Survey and the two HAL Surveys) they cannot be used with a high level of confidence to assess how the face of disability has changed over time. The statistics which follow are based on the HAL Surveys since they are the most recent comprehensive surveys, unless otherwise noted. Data from the first HAL Survey is used where the published reports provide more extensive data.

Table 1 shows that in 1986-87, 13% of Canadians reported having a disability. 8% of the disabled population were 0 - 14 years old, 54% were 15 - 64, and 36% were over age 65. 5% of the 0 - 14 age group, 10% of the 15 - 64 age group, and 45% of the over 65 age group reported having a disability. Considering only the 15 and over age group this survey showed 15.4% of the population reporting a disability. This accords well with a 1978-79 Canada Health Survey which showed 14.3% of this age group reporting a disability. The 1983-84 CHD Survey, which did not include mental illness, showed 12.8% of the over 15 age group reporting a disability.

The 1991 HAL Survey showed a slightly higher percentage of each age group reporting a disability: age 0 to 14 - 7%, age 15 to 64 - 12.9%, and age 65 + - 46.3%, total population - 15.5%. The increase occurred among those reporting a mild disability and can be attributed to an aging population as well as changes in the survey methods.23

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Table 1: Total Population and Disabled Population by Age Group

<table>
<thead>
<tr>
<th></th>
<th>0 - 14</th>
<th>15 - 64</th>
<th>65 +</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population</td>
<td>25,061,270</td>
<td>5,325,185</td>
<td>17,051,420</td>
</tr>
<tr>
<td>21.2%</td>
<td>68.0%</td>
<td>10.7%</td>
<td></td>
</tr>
<tr>
<td>Disabled Population</td>
<td>3,316,875</td>
<td>277,300</td>
<td>1,817,580</td>
</tr>
<tr>
<td>13%</td>
<td>8.36%</td>
<td>54.79%</td>
<td>36.84%</td>
</tr>
<tr>
<td>% of disabled age group</td>
<td>5.20%</td>
<td>10.65%</td>
<td>45.51%</td>
</tr>
<tr>
<td>Disabled Population</td>
<td>1,235,890</td>
<td>212,984</td>
<td>212,984</td>
</tr>
<tr>
<td>% of total age group</td>
<td>100%</td>
<td>97.9%</td>
<td>85.3%</td>
</tr>
</tbody>
</table>

Table 2 shows the vast majority of disabled Canadians of all age groups live in households but the percentage of disabled people living in institutions jumps markedly for the age 65 and over group. Table 3 shows a marked increase in the percentage of severe disabilities in the over 65 age group but this increase is not as large as the jump in institutionalization of this age group.

Table 2: Disabled Population by Age and Residence

<table>
<thead>
<tr>
<th></th>
<th>0 - 14</th>
<th>15 - 64</th>
<th>65 +</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Disabled Population</td>
<td>389,355</td>
<td>2,346,455</td>
<td>1,448,875</td>
</tr>
<tr>
<td>Disabled Population Living in Households</td>
<td>389,355</td>
<td>2,297,179</td>
<td>1,235,890</td>
</tr>
<tr>
<td>100%</td>
<td>97.9%</td>
<td>85.3%</td>
<td></td>
</tr>
<tr>
<td>Disabled Population Living in Institutions</td>
<td>--</td>
<td>49,275</td>
<td>212,984</td>
</tr>
<tr>
<td>--</td>
<td>2.1%</td>
<td>14.7%</td>
<td></td>
</tr>
</tbody>
</table>

Table 4 shows the type of disability by age group and Table 5 shows the types and frequency of the use of assistive devices. Tables 3, 4, and 5 show how varied disability

24. Based on information from the 1986-87 HAL Survey, supra, fn. 20.
25. Based on data from the 1991 HAL Survey, ibid. Children in institutions were not included in the 1991 survey but the 1986-87 HAL Survey reported an estimated 2,400 children with disabilities in institutions (0.9% of disabled children).
conditions are in the population and make it clear that planning for full integration will require consideration of a large number of variables. The frequency of the various types of disability, their severity, and the use of different types of assistive devices may well have an impact on the policy decisions about how, when, and where to make the necessary provisions for a full integration policy to be implemented.

Table 3: Percentage of Total Disabled Population by Age Group and Severity

<table>
<thead>
<tr>
<th></th>
<th>0 - 14</th>
<th>15 - 64</th>
<th>65 +</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mild</td>
<td>89.5</td>
<td>53.8</td>
<td>35.1</td>
</tr>
<tr>
<td>Moderate</td>
<td>7.6</td>
<td>31.4</td>
<td>32.5</td>
</tr>
<tr>
<td>Severe</td>
<td>2.9</td>
<td>14.8</td>
<td>32.4</td>
</tr>
</tbody>
</table>

Table 4: Type of Physical Disability by Age

<table>
<thead>
<tr>
<th></th>
<th>0 - 14</th>
<th>15 - 64</th>
<th>65 +</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mobility</td>
<td>37,350</td>
<td>1,047,825</td>
<td>752,925</td>
</tr>
<tr>
<td>Agility</td>
<td>15,525</td>
<td>916,840</td>
<td>621,560</td>
</tr>
<tr>
<td>Seeing</td>
<td>27,770</td>
<td>204,360</td>
<td>241,515</td>
</tr>
<tr>
<td>Hearing</td>
<td>47,970</td>
<td>417,235</td>
<td>443,620</td>
</tr>
<tr>
<td>Speaking</td>
<td>37,110</td>
<td>117,210</td>
<td>53,725</td>
</tr>
<tr>
<td>Other</td>
<td>26,235</td>
<td>495,565</td>
<td>266,855</td>
</tr>
</tbody>
</table>


27. Based on data from the 1986-87 HAL Survey, *supra*, fn. 20. The "Other" category is defined as "mental handicap, including developmentally delayed, mentally retarded" and "learning disability" for the 0 - 14 age group and for the other two age groups as "learning disabled, emotional or phycological disability, or developmentally delayed".
Table 5: Number of People Using of Assistive Devices by Age Group\textsuperscript{28}

<table>
<thead>
<tr>
<th>Type of Device</th>
<th>0 - 14</th>
<th>15 - 64</th>
<th>65 +</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wheelchairs</td>
<td>8,710</td>
<td>46,030</td>
<td>47,130</td>
</tr>
<tr>
<td>Crutches and other walking aids</td>
<td>5,440</td>
<td>142,995</td>
<td>231,290</td>
</tr>
<tr>
<td>Medically prescribed footwear</td>
<td>23,200</td>
<td>22,445</td>
<td>10,260</td>
</tr>
<tr>
<td>Artificial limbs</td>
<td>920</td>
<td>11,115</td>
<td>6,290</td>
</tr>
<tr>
<td>Hearing aids</td>
<td>11,670</td>
<td>67,865</td>
<td>164,275</td>
</tr>
<tr>
<td>Vision aids other than glasses</td>
<td>3,055</td>
<td>62,525</td>
<td>108,105</td>
</tr>
<tr>
<td>Brace other than braces for teeth</td>
<td>14,605</td>
<td>51,640</td>
<td>13,690</td>
</tr>
<tr>
<td>Other aids</td>
<td>24,495</td>
<td>47,880</td>
<td>19,005</td>
</tr>
</tbody>
</table>

Table 6, based on the 1983-84 CHD Survey, sets out the degree of dependence in performing everyday tasks in the over age 15 group. The 1986-87 HAL Survey reported on the number of people 'getting help with' and 'needing help but not receiving any' for a similar list of everyday tasks but not the level of dependency. Although the HAL Survey reported about 600,000 more disabled people in this age group, it reported substantially fewer people getting or needing help for each of the similar activities.\textsuperscript{29} The differences are so significant they can not be explained as chance variations. The differences must reflect the uncertainty inherent in measuring many aspects of disability.

\textsuperscript{28} Based on data from the 1986-87 HAL Survey, \textit{ibid.}

\textsuperscript{29} 1986-87 HAL Survey, \textit{ibid}, pp. 3-11, 4-5, and 4-7.
Table 6: Disabled Persons by Degree of Dependence Performing Everyday Activities (age 15 and over, in thousands).

<table>
<thead>
<tr>
<th>Activity</th>
<th>Total</th>
<th>Dependent</th>
<th>Partially Dependent</th>
<th>Independent</th>
<th>Unable to Assess</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shop for Groceries or Necessities</td>
<td>2,448</td>
<td>588</td>
<td>320</td>
<td>1,309</td>
<td>156</td>
</tr>
<tr>
<td>Get Around in own Neighbourhood or Area</td>
<td>2,448</td>
<td>347</td>
<td>135</td>
<td>1,845</td>
<td>46</td>
</tr>
<tr>
<td>Do Heavy Household Chores, Gardening or Yardwork</td>
<td>2,448</td>
<td>980</td>
<td>350</td>
<td>819</td>
<td>222</td>
</tr>
<tr>
<td>Do Everyday Work within Home, Including Cooking</td>
<td>2,448</td>
<td>319</td>
<td>210</td>
<td>1,610</td>
<td>230</td>
</tr>
<tr>
<td>Get Around within own Home</td>
<td>2,448</td>
<td>67</td>
<td>62</td>
<td>2,224</td>
<td>18</td>
</tr>
<tr>
<td>Take Personal Care of Oneself</td>
<td>2,448</td>
<td>107</td>
<td>81</td>
<td>2,163</td>
<td>18</td>
</tr>
</tbody>
</table>

B. The Social Standing of Disabled People:

i. Deviance and Segregation:

Historically, mentally and physically disabled people have been hidden, ignored, and shunned. In Europe and North America they were harried by various Poor Laws.

30. Based on the CHD Survey, supra, fn. 19.
31. tenBroek, supra, fn. 3, pp. 809-11.
or left to the mercies of Church or religious based charity.\(^{32}\) As governments became more involved with disabled people in the twentieth century the approaches and attitudes of before were simply transferred to the new custodians. With disabled people removed from society, society could go about its business without regard to their needs. The absence of disabled people from mainstream society meant that negative attitudes could continue to flourish in the absence of any need to confront disabled people and their needs or to confront the reality that the currently able bodied could at any time become disabled. Disabled people are portrayed negatively in the media, television and movies, and literature and are subject to "prejudice resting on superstition, misunderstanding, and false concepts of capacity to work".\(^ {33}\) Having no experience of interacting with disabled people "discomfort or embarrassment on the part of those with whom he or she comes into contact is an everyday occurrence of many handicapped people".\(^ {34}\)

Adults tend to be turned off when they see obvious disabilities, feeling guilty and embarrassed and wishing that they could get away. While the teenagers tend to feel somewhat awkward, they are more likely to be sympathetic and to try to relate to the disabled persons as individuals, or on an equal basis.\(^ {35}\)

The history of society's formal methods of dealing with disabled people is the story of "segregation and inequality".\(^ {36}\)

These comments are, of course, generalizations and it is important to recognize

\(^{32}\) Disabled Persons in Canada, pp. 16 et seq. The late 19th and early 20th centuries saw a number of non-sectarian charities established: for example, Canadian Red Cross, 1896; Victorian Order of Nurses, 1898; Hospital for Sick Children (Toronto), 1875; Canadian Tuberculosis Association (now the Canadian Lung Association), 1900; Ontario Society for Crippled Children, 1922.


\(^{34}\) Burgdorf, supra, fn. 4, p. 49 and, generally, Kriegel, supra, fn. 16.

\(^{35}\) Disabled Persons in Canada, supra, fn. 32, p. 43. M. David Lepofsky and Jerome E. Bickenback, in Equality Rights and the Physically Handicapped, in Anne F. Bayefsky and Mary Eberts (eds), Equality Rights and the Canadian Charter of Rights and Freedoms, p. 323 at p. 327, reduce the influence of animus and scorn towards disabled people and emphasize the attitudes of "pity and charity" in shaping society's relationship to disabled people.

\(^{36}\) Burgdorf, supra, fn. 4, p. 49. Kriegel, supra, fn. 16. Life Together, supra, fn. 34, p. 73. DeJong and Lifchez, supra, fn. 10, p. 47.
factors which qualify them. The amount of segregation and inequality depended, and
depends, on the nature and severity of the disability, the class origins of the person,
whether the person lived in a rural or urban area, etc. Until very recent times, medical
science and technology could provide profoundly disabled people only a low level of
technical aid to overcome the functional limitations imposed by the disability.
Segregation and isolation were a result of the combination of the lack of technical aids,
social prejudice, paternalistic attitudes of superiority by the caring professions, and the
refusal of society to accommodate the needs of disabled people. 37

Building up the skills of disabled people is only a partial answer to the problem of
their isolation. In addition to their impairments, disabled people may be
constrained by what others permit them to do and where others permit them to
be. These constraints may be the product of discomfort or of sincere concern on
the part of able-bodied gatekeepers. Whatever the motivation, the life chances for
disabled people become limited by much more than their actual disabilities. 38

Marcia H. Rioux has described four paradigms commonly used to analyze the role
of disabled people in society. 39

1) Disability as Sickness: A person with a disability is defined as sick and treated
accordingly; the medical profession tries to cure the sick patient; "The sick role
assumes a loss of rights related to the condition or disease". The patient looks to
the doctor for direction and the doctor expects the patient to do so. The "sickness"
model is seen in the pervasive use of pre-employment medicals, to have a doctor
say if a person is fit to work, and the role of the profession in setting medical
requirements for driver licences. Energy, both personal and social, is spent trying
to "cure" the sick person instead of modifying society to allow the individual

California Law Review 814 at p. 816: "The custodial attitude is typically expressed in policies of
segregation and shelter, of special treatment and separate institutions."
38. Scotch, *supra*, fn. 17, p. 28.
maximum free choice.  

2) Disability as Deviance: A person is seen as different in a negative way from social norms. The deviance model emphasizes social and behavioural peculiarities exhibited by the person. This may be taken as justification to isolate the person and remove rights and responsibilities because of the inferior status of the person.

There is the presumption that care and treatment can best be determined by others, ranging from family to experts. The deviant person is stripped of his/her ability to make independent judgements.

3) Disability as Charity: In return for "being kept" by society, the disabled person must be grateful for what the care-givers choose to give. The gulf between the disabled recipient and the able-bodied giver is maximized in terms of power and social standing. The claim on society is reduced to what magnanimous people choose to give for reasons of their own. The recipient has no right to the gifts and, therefore, no legitimate claim to control or influence the givers.

4) The 'Beggar' Stereotype: This involves the untested assumption that the disabled person is destitute and lacking in dignity and pride. A beggar is seen as a person making no economic contribution and taking no responsibility for his/her own lot in life. The effect is to further stigmatize people and a self-perpetuating cycle is established which maintains the individual in his/her marginalized social position.

ii. Barriers:

The barriers disabled people face include legal, social, economic, and

41. Ibid, pp. 619. See also tenBroek, supra, fn. 3, at p. 812, and Liachowitz, supra, fn. 9, pp. 139 et seq.
42. Rioux, ibid, p. 619. See also Kriegel, supra, fn. 16.
43. Rioux, ibid, p. 619.
medical/technological. With the possible exception of the last, the barriers exist primarily because it has been the able bodied who arranged the world to suit their needs. The absence of disabled people from society has allowed the others to simply not think about the needs of disabled people.

Four major types of barriers limit the life options of disabled people: 1) social bias, 2) neutral standards having an adverse effect, 3) failure to accommodate, and 4) insurmountable barriers due to the disability itself.44

Social biases against disabled people, as has been seen, are deeply ingrained in Western cultures.45 This bias is a significant barrier to disabled people wishing to enter the mainstream of society and make their full contribution. This bias may take the form of hostility towards disabled people individually and as a group. Widely held negative stereotypes about disabled people support the stigmatisation of the group. People who are ignorant about and uncomfortable in the presence of disabled people have no inclination to inform themselves about or get to know any disabled people. Fear of becoming disabled themselves, through disease or accident, is also a significant influence on people's attitudes. Social bias may also be manifested by paternalism. Although this attitude is presented positively, it is still a significant barrier to the individual autonomy of disabled people. Paternalism can, of course, also mask an underlying animus. It is probably impossible to separate the influence of stigmatization and paternalism in the policy decisions of the early 20th century to institutionalise mentally and physically disabled individuals. When considering the many employment policies prohibiting the hiring of disabled people, the concern for the person's safety and the interest in avoiding compensation claims are frequently inextricably mixed.


45. This is probably also true in most cultures but this has not been specifically researched for this thesis.
Many facially neutral standards have an adverse effect on the opportunities of many disabled people. The essence of this type of barrier is that the standard is neutral in the sense that it makes no reference to disabled people. However, while the vast majority of people are not hindered by the standard, for the disabled person it is a barrier. The classic legal formulation of this type of barrier is that a facially neutral standard disproportionately excludes a group of people because of their group characteristic. The barrier exists because the standard maker has chosen a standard which excludes disabled people instead of one which could achieve the same objective without restricting disabled people.

Architectural barriers are prime examples of facially neutral standards which have an adverse effect on disabled people. In 1980 Michael Huck went to a theatre in Regina, Saskatchewan. Huck relies on a wheelchair for mobility. He was asked if he could transfer to a regular seat and replied he could not. He was told that the only place he would be allowed to place his wheelchair to view the movie was in front of the front row. He watched the movie and the next day filed a complaint of discrimination. The Saskatchewan Court of Queen’s Bench rejected the complaint saying that the theatre had offered Huck what it offered the public, viz a movie and a seat, and it was Huck’s disability that prevented him from accepting that offer, not a discriminatory act by the theatre. The Court of Appeal reversed, holding that the treatment Huck received had the effect of restricting his opportunity to enjoy the public service in a way comparable to others because of his disability. The theatre was required to ensure people using wheelchairs were accommodated by providing a choice of spaces from which they and their friends could view a movie.


The Social Construct of Disability

In Canadian Paraplegic Association v. Canada (Elections Canada)(No.2)\textsuperscript{48} several people complained they were unable to vote or were subjected to differential, and in some cases, embarrassing and unsafe, treatment because their polling booths for the 1984 federal election were not accessible. The Tribunal held that they had been discriminated against by the failure to ensure the polling booths were accessible to people using wheelchairs. The adverse effect stairs have on users of wheelchairs is obvious. However, there are thousands of examples of standards which adversely affect some disabled people. For example, even if a public telephone is properly signed so a blind person can find it and the telephone is lowered so a person using a wheelchair can reach it, a person using a hearing aid will be unable to use the standard telephone receiver because it is incompatible with the hearing aid. Compatible receivers are readily available but some decision maker must decide to install them.

A related barrier occurs when a disabled person could use a service if certain elements were modified to accommodate the special needs of the person. Mark Martin refers to this type of barrier as a "surmountable impairment barrier". In this situation, the disabled person could use the service if some alterations to the usual requirements were made to accommodate, or take into account, the functional limitations caused by the disability. Sometimes this requires only an exception to the general rule and sometimes it requires a permanent alteration to the environment. In 1979 Yvonne Peters wanted to visit her father-in-law who was in the University Hospital in Saskatoon, Saskatchewan. Peters uses a guide dog to assist her freedom of movement. The Hospital had a general no dogs rule and applied it to prevent Peters from visiting if she brought her dog. Regardless of whether the presence of dogs would promote patient recovery, it is a rule that most people can understand and obey without any problem. Despite her disability, Peters would have been able to complete her visit on her own but for the rule. The

Hospital refused to make an exception for guide dogs. Four and a half years later the Saskatchewan Court of Appeal held that Peters had been discriminated against by the refusal of the Hospital to amend its general rule to accommodate Peters' disability.\(^{49}\)

The difference between these two barriers is that the first (neutral standards having an adverse effect) is based on passive discrimination while the second (failure to accommodate) is based on active discrimination. In the case of wheelchair access the service provider delivers the service from a particular building. In most cases the provider has not designed the building and simply takes it as it is. In the case of the hospital the administrators actively thought about and made a rule which they would not vary to accommodate the visitor. These two barriers are very similar and some may well argue that distinguishing them to emphasize active versus passive discrimination is not helpful.

Sometimes a person's disability is of such a nature that no reasonable accommodation is possible. This person is facing, to use Martin's phrase, an "insurmountable impairment barrier". A disability may present an insurmountable barrier because it really is insurmountable or because of a policy decision that the amount of accommodation which would be required is unreasonable.

iii. Consequences:

The consequences of these social attitudes and barriers are cumulative. For example, lack of access to education when young will adversely affect work options later; lack of access to public transportation will adversely affect work and recreation options. Disabled people are socially and economically marginalized and experience a disproportionately high rate of unemployment and poverty.

Table 7 shows that in the order of one third of disabled people reported having expenses related to disability but not reimbursed by any insurance or government program. Since the HAL Survey did not report on the amount of money spent, Table 8 reflects the CHD Survey results on amounts spent but that survey did not report on the purpose of the expenditures. Note also the different total disabled populations.

Table 7: Number of People Having Expenses Related to Disability Not Reimbursed by any Insurance or Government Program

<table>
<thead>
<tr>
<th></th>
<th>0 - 14</th>
<th>15 - 64</th>
<th>65 +</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Disabled Population</td>
<td>277,300</td>
<td>1,817,580</td>
<td>1,221,995</td>
</tr>
<tr>
<td>Total Having Expenses</td>
<td>81,235</td>
<td>651,950</td>
<td>330,720</td>
</tr>
<tr>
<td>Prescription and Non-Prescription Drugs</td>
<td>41,230</td>
<td>465,420</td>
<td>207,005</td>
</tr>
<tr>
<td>Special Clothing, Aids, Medical Supplies</td>
<td>37,380</td>
<td>140,630</td>
<td>75,775</td>
</tr>
<tr>
<td>Non-insured Health and Medical Services</td>
<td>12,010</td>
<td>119,685</td>
<td>49,275</td>
</tr>
<tr>
<td>Transportation</td>
<td>29,250</td>
<td>189,645</td>
<td>92,505</td>
</tr>
<tr>
<td>Personal Services (Attendant, Home Care)</td>
<td>6,975</td>
<td>56,010</td>
<td>64,515</td>
</tr>
<tr>
<td>Modifications to Residence</td>
<td>4,575</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Tuition or Residence Fees</td>
<td>10,800</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Other</td>
<td>10,845</td>
<td>73,460</td>
<td>30,090</td>
</tr>
</tbody>
</table>

According to the Canadian Health and Disability Survey, compared to the 25% of the adult population (age 15 - 64) who are not in the labour force, 52% of disabled adults of that age group are not in the labour force. However, considering only those who were in the labour force, the unemployment rate for disabled persons was 13.3% compared to a rate of 9.9% for non-disabled persons (June 1984).

50. Based on data from the 1986-87 HAL Survey, supra, fn. 20.
51. Supra, fn. 19.
Table 8: Amount of Expenditure Related to Disability, age 15 and over.\textsuperscript{52}

<table>
<thead>
<tr>
<th>Total Disabled Population</th>
<th>15 - 64</th>
<th>65+</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Extra Expenses</td>
<td>926,000</td>
<td>561,000</td>
</tr>
<tr>
<td>Extra Expenses</td>
<td>564,000</td>
<td>314,000</td>
</tr>
<tr>
<td>$1 - 199</td>
<td>201,000</td>
<td>138,000</td>
</tr>
<tr>
<td>$200 - 499</td>
<td>181,000</td>
<td>98,000</td>
</tr>
<tr>
<td>$500 - 999</td>
<td>88,000</td>
<td>38,000</td>
</tr>
<tr>
<td>$1,000 and over</td>
<td>66,000</td>
<td>22,000</td>
</tr>
<tr>
<td>Not Stated</td>
<td>74,000</td>
<td>35,000</td>
</tr>
</tbody>
</table>

Table 9 shows 61% of those reporting "some disability", 75% of those reporting "moderate disability", and 92% of those reporting "major disability" were not in the labour force.

Table 9: Disabled Persons by Degree of Disability and Labour Force Status, age 15 - 64, in thousands\textsuperscript{53}

<table>
<thead>
<tr>
<th>Degree of Disability</th>
<th>Some Disability</th>
<th>Moderate Disability</th>
<th>Major Disability</th>
<th>Degree Unknown</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employed</td>
<td>449</td>
<td>112</td>
<td>25</td>
<td>88</td>
<td>675</td>
</tr>
<tr>
<td>Unemployed</td>
<td>58</td>
<td>21</td>
<td>2</td>
<td>17</td>
<td>98</td>
</tr>
<tr>
<td>Not in Labour Force</td>
<td>379</td>
<td>183</td>
<td>118</td>
<td>85</td>
<td>765</td>
</tr>
<tr>
<td>Total</td>
<td>886</td>
<td>316</td>
<td>145</td>
<td>190</td>
<td>1,538</td>
</tr>
</tbody>
</table>

\textsuperscript{52} Based on data from the CHD Survey, \textit{supra}, fn. 19.

\textsuperscript{53} Based on data from the CHD Survey, \textit{supra}, fn. 19.
The Social Construct of Disability

Table 10 shows that disabled people who were employed were distributed among occupations essentially in the same proportions as non-disabled people were distributed. The exceptions were the sciences where disabled people were represented at 2.9% compared to 5.3%, fishing/forestry/mining where disabled people were not represented compared to 1.4%, and in agriculture where disabled people were represented at 8.8% compared to 4.6%.

Table 10: Disabled Employees by Major Occupational Grouping

<table>
<thead>
<tr>
<th></th>
<th>Disabled (thousands)</th>
<th>Disabled (% of total group)</th>
<th>Non-Disabled (thousands)</th>
<th>Non-Disabled (% of total group)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Managerial/Administrative</td>
<td>48</td>
<td>7.1</td>
<td>916</td>
<td>8.8</td>
</tr>
<tr>
<td>Sciences</td>
<td>20</td>
<td>2.9</td>
<td>552</td>
<td>5.3</td>
</tr>
<tr>
<td>Teaching</td>
<td>23</td>
<td>3.4</td>
<td>491</td>
<td>4.7</td>
</tr>
<tr>
<td>Artistic/Recreation</td>
<td>10</td>
<td>1.5</td>
<td>157</td>
<td>1.5</td>
</tr>
<tr>
<td>Clerical/Sales/Services</td>
<td>285</td>
<td>42</td>
<td>4286</td>
<td>41.0</td>
</tr>
<tr>
<td>Agriculture</td>
<td>60</td>
<td>8.8</td>
<td>487</td>
<td>4.6</td>
</tr>
<tr>
<td>Fishing/Forestry/Mining</td>
<td>--</td>
<td>--</td>
<td>151</td>
<td>1.4</td>
</tr>
<tr>
<td>Processing/Assembling</td>
<td>85</td>
<td>12.6</td>
<td>1242</td>
<td>12.0</td>
</tr>
<tr>
<td>Construction</td>
<td>33</td>
<td>4.8</td>
<td>593</td>
<td>5.7</td>
</tr>
<tr>
<td>Transportation/Materials/Handling</td>
<td>46</td>
<td>6.8</td>
<td>661</td>
<td>6.3</td>
</tr>
<tr>
<td>Others</td>
<td>65</td>
<td>9.6</td>
<td>884</td>
<td>8.5</td>
</tr>
<tr>
<td>Totals</td>
<td>675</td>
<td>100</td>
<td>10,420</td>
<td>100</td>
</tr>
</tbody>
</table>

The social and economic status of disabled people is currently unsatisfactory from

54. Based on data from the CHD Survey, *ibid.*
the point of view of disabled people themselves and in a society which claims to place a high value on equality and human dignity. In the next chapter I will discuss the nebulous concept of equality and consider what equality for disabled people might look like. Because there is disagreement among disabled people about the exact nature of equality, as there is among everyone else, I will be using the general phrase "interests of disabled people" to reflect the desire for change without any implication that the interests of all disabled people are the same. It is indeed because there are many competing concepts of equality and disagreements about the best way to achieve equality that it is particularly difficult to reach consensus on public policy.
Canadian law has not developed a definite philosophy of equality. Although a concept of substantive equality has been utilized by the Supreme Court of Canada, and there are signs that it will become the theory of choice when interpreting the Charter, there is no certainty that it will survive the inevitable attacks upon it nor that it will spread to lower courts, and still less that it will become a basic principle upon which politicians and bureaucrats fashion public policy.

This chapter will review the traditional common law notion of formal equality and some of its weaknesses. The developing concept of substantive equality will be reviewed. Since simply adopting a theory of substantive equality does not completely describe the face of equality for disabled people in modern Canadian society, some of the ways in which substantive equality may be implemented will be canvassed. The full integration equality paradigm will be reviewed in detail and recommended as the most appropriate since it calls for a society based on inclusion, not exclusion, and respect for individual choice within the context of communal responsibility for all members of society. The chapter ends with a brief review of mechanisms which control and limit the equality claims of disabled people.

1. Honourable Kenneth H. Fogarty, Equality Rights and Their Limitations in the Charter, p. 1. See chapter VI for a review of the current interpretation of the equality rights section of the Charter. The Supreme Court of Canada has devised a concept of equality based on the absence of discrimination because of a ground enumerated in s. 15(1) or analogous to such a ground. However, the parameters of this description of equality are still unsettled. Despite the pronouncements of the Court to date, in my view the definition of equality in Canadian law is still sufficiently fluid that Fogarty's observation remains accurate.

2. Shelagh Day, The Process of Achieving Equality, in Human Rights in Canada, p. 17 at p. 19: "... a substantive model of equality has been developed over the last five years in human rights and constitutional equality rights jurisprudence."

A. The Elastic Concept of Equality:

Equality is an ancient concept, dating back at least to classical Greece in the western tradition. It is an essential philosophical concern and a basic tool of political propaganda. Equality has attracted the attention of major philosophers throughout the ages and the debate has still not reached a definitive conclusion. Because of its philosophical elasticity, equality has been, and remains, a potent political concept used by those supporting the status quo as well as those urging more or less radical change.

Peter Weston has argued that equality is an empty concept because one must specify or assume some standard against which things are to be compared and the concept of equality does not prescribe that standard of measurement. Thus, in itself, the concept provides no guidance to decision making. Since the standard must be found in some other rule, the rule of equality is superfluous.4 "To the extent that a statement of equality is framed in non-tautological terms, it will, in Professor Weston's terms, 'logically entail (and necessarily collapse into) simpler statements of rights'."5

Despite the philosophical concerns of Weston and others, I think it is because equality is not a self-defining concept that it is enlisted in support of widely differing political views. As Kenneth Karst has said, equality

is not a philosopher's universal, but a culturally specific and evolving ideal. The ideal not only has substantive content; it is a cluster of substantive values, with moral underpinnings solidly based in a particular society's religious and


5. Marc Gold, Moral and Political Theories in Equality Rights Adjudication, in Joseph M. Weiler and Robin M. Elliot (eds.), Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms, p. 85 at p. 91. In a similar vein, but criticising the concept of "rights", Mark Tushnet, in An Essay on Rights, (1984), 62 Texas L. R. 1364 at p. 1379 argues the concept of rights can not justify a claim for some desired objective because rights are essentially indeterminate: "Fundamental indeterminacy occurs because rights have a social context. When we try to specify a particular right in some localized area, we discover that we have committed ourselves to a description of an entire social order." See also Elizabeth Kingdom, What's Wrong with Rights: Problems for Feminist Politics of Law, in which she argues rights discourse can not advance the feminist agenda and may even be a hindrance.
}

The degree of consensus on the meaning of equality varies among societies and over time. Societies in which there is a high degree of consensus on the substantive content, in other words, which have agreed on the cluster of values incorporated into the concept, will be stable societies. In those circumstances the appeal to equality strikes a popular chord and reinforces the \textit{status quo}. Societies in which the selection of values which provide the substantive content for the concept is in dispute are societies in a state of change.\footnote{See generally Fogarty, \textit{supra}, fn. 1.}

The concept of equality is an essential element of our culture and we are in state of change. It is, therefore, necessary to argue for a formulation of the concept which will advance the interests one seeks to advance.

For any theory of equality to be useful in informing debate about social policy it must be theoretically sound, useful for formulating social policy, and "embedded within an overall desirable context, rather than seen as the only important goal."\footnote{Eichler, \textit{supra}, fn. 6, at p. 207, uses the example of the equality between men and women in the society described in \textit{1984} by George Orwell.}

Section 15 of the \textit{Charter of Rights and Freedoms}\footnote{Part I of the Constitution Act, 1982 [enacted by the Canada Act, 1982 (U.K.), c. 11] (hereafter referred to as the "Charter"):}

\begin{verbatim}
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
\end{verbatim}

\textit{does not} speak of "equality" whilst most human rights legislation\footnote{Except Ontario where the \textit{Human Rights Code}, R.S.O. 1990, c. H-19, uses an equality phraseology. For example, s. 1:}

\begin{verbatim}
Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin,
\end{verbatim}
a different result occur if an issue is viewed as a demand for a right to "equality" or as a demand for a right to "not be discriminated against"? In practice the answer is "no". Anne Bayefsky argues that "equality ... and non-discrimination are positive and negative statements of the same principle." Thus, the remedy that is sought from a complaint under human rights legislation should be, in effect, a step towards greater equality for the individual complainant or the group affected by the substance of that complaint.

i. Equality at Common Law (Formal Equality):

Aristotle set forth the proposition that equals should be treated equally and unequals treated unequally in proportion to their mutual inequality. Aristotle recognized that his approach failed to establish criteria for determining who was equal to whom, or what factors should be considered in assessing whether two people were equal or unequal to each other and he did not try to provide them. The political and social consequences of his theory were an "elite meritocracy" within a society exhibiting gross inequality. Despite its short-comings, the Aristotelian ideal has informed dominant Western philosophies of equality up to the present day. It is also the philosophical underpinning of the concept of equality as it has been developed in the common law tradition.

citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.


13. Abella, supra, fn. 6, at p. 9.
At no time did the common law take into account the reality that society was not, and is not, composed of individuals of equal power and wealth. "The common law's equality was purely formal... Thus, all individuals were treated as equals by the law, while they lived their lives in relations of radical inequality."14

Formal equality refers to equality in the form of the law and it is variously formulated as requiring that like be treated alike and unlike unlike, or that those who are similarly situated be treated the same. According to this theory, equality obtains if the law, in its form, treats men and women the same, or able-bodied and disabled persons the same, unless they are differently situated.15

Formal equality is a process oriented concept variously described as "equality of treatment" or "equal treatment". Another variation is "treatment as an equal" which implies "using a more diffuse norm ... to recognize the inherent worth and dignity of men and women and an entitlement to appropriate treatment accordingly."16

ii. The Failure of Formal Equality:

Formal equality is incapable of achieving an equal distribution of benefits and opportunities among the members of society, or even, more modestly, eliminating discriminatory barriers, for two main reasons.

First, formal equality defines equality as sameness and difference not dominance and subordination and, therefore, ignores the cause of inequality. This theory is based on the false belief that individuals have equality of opportunity (and inequality is just a lapse from this norm) and that those differences which are considered to matter justify unequal treatment. In fact, most individuals make equality claims because their group membership

has caused them to be in a subordinate position and to be treated less favourably. In the context of formal equality they must argue their difference is not a difference that should matter, instead of recognizing that the difference is due to their subordinate position in society and arguing they should not be in a subordinate position.\(^\text{17}\)

This leads to the second problem. When making a claim for equal treatment one must compare oneself to someone else who becomes the norm against which your claim to equality is measured. In the context of sex discrimination, although described as sameness, it is really maleness that is the norm and femaleness is seen as deviation from the norm. Thus, when inequality is caused by a biological or social fact affecting only women there can be no remedy because there is no legal inequality. With formal equality disadvantage is made to disappear and this is justified and perpetuated because there is equality as long as people are subject to the same law and administrative procedures.\(^\text{18}\) The same applies to comparisons made on other group factors such as race or disability.

### iii. Substantive Equality:

An alternative conception of equality, one which is more useful to advancing the equality claims of disadvantaged groups, including disabled people, is the theory of substantive equality.\(^\text{19}\)

Substantive equality means equality in the substance of one's condition... [It requires] real remedies for conditions of inequality.\(^\text{20}\)

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19. Various other terms have been used to describe the same concept: Eichler, supra, fn. 6, "equality of result"; Katherine Swinton, Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations, in Research Papers of the Commission on Equality in Employment, "equality in output"; Mossman, supra, fn. 14, "equality of outcome", specifying that the standard to be used not be based on the male norm.
As a legal paradigm of equality this concept requires, in considering whether a particular law or practice violates the principle of equality, that one begin by asking if it has an adverse impact on the complainant. Then one must determine whether its purpose or effect is to reduce social stratification or disadvantage. If it does, it moves towards equality and no violation of the principle of equality exists. The same is true if it is neutral as to disadvantage. If the measure widens the gap unjustifiably it moves away from equality and violates the principle of equality. Of course, unless one assumes there can never be a justification for widening the gap, the word "unjustifiably" presents the same philosophical conundrum: when is it justifiable to widen the gap?

Substantive equality can be sub-divided into weak and strong senses. In its weak sense it can require temporary measures to limit program benefits to a particular disadvantaged group or provision of longer term supportive activities such as child care or mentoring services or, in its strong sense, it may demand the long term redistribution of wealth and opportunity so as to bring about the desired objective. In the weak sense it may mean taking account of a group factor such as disability by eliminating artificial barriers or providing limited and inexpensive assistance to permit equality of result. In the strong sense it may mean the imposition of quotas or redirecting significant resources to enable disabled people to enter mainstream society.


22. For example, in *Huck v. Canadian Odeon Theatres Limited* (1985), 18 D.L.R. (4th) 93, 6 C.H.R.R. D/2682, the Saskatchewan Court of Appeal upheld a Board of Inquiry order that Odeon Theatres had to modify its cinema so that patrons who use wheelchairs have a choice of places to sit in the cinema and designed so that they can sit beside non-wheelchair using companions.

The *Employment Equity Act*, S.C. 1986 c.-31, is found upon this weak sense of substantive equality. It requires employers to devise an "action plan" to identify and remove artificial barriers to employment of target group members and the development of goals and timetables to attain a representational workforce. It does not require or authorize employment quotas.

23. In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (Action Travail des Femmes)* [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210, the Court upheld a Tribunal order which combined examples of both weak and strong substantive equality. Reflecting the weak sense the Tribunal ordered CNR to stop using the discriminatory Bennett Mechanical employment test, apply physical test requirements applicable equally to women and men, and to revise its system of publicizing employment opportunities. Reflecting the strong sense, it also upheld the order which required CNR to hire one woman for every four hires until women represented 13% of the workforce which was their
Affirmative action, a particularly useful tool for promoting equality, is particularly difficult to reconcile with formal equality theory. Professor MacKinnon has said using formal equality in the context of affirmative action requires contorting logic to the breaking point: giving a reverse preference is still a preference on the basis of race or sex, etc.\textsuperscript{24}

Substantive equality rejects the formal equality ideal that decision making should take no account of race, sex, disability, etc. Abella, attempting to dismiss the conflict between group rights and individual rights in the context of substantive equality theory, says that individuals experience discrimination because of group characteristics. She attempts to make the conflict disappear by arguing that:

The group becomes an evidentiary collaborator in assessing the merits of an individual's claim. It is the individual's right to equality, notwithstanding membership in a group, but also the individual's right to equality based on membership in a group... The question is whether equality exists, not whether individual or group rights prevail.\textsuperscript{25}

MacKinnon takes a blunter, and more clear cut, approach. She argues that formal equality should be openly rejected and dismissed as being an inappropriate theoretical basis for structuring society. Using substantive equality theory allows one to recognize the socially subordinate status of some groups, defined by their disability or sex, etc. Affirmative action, as a remedy for inequality, is coherently integrated with this theory. The white, able-bodied, heterosexual male can not claim an individual right to equality based on the ideal that everyone should be treated the same when he lives in an unequal society. He may have to make his contribution to correcting the age old dominance his group has enjoyed. "To intervene to alter this balance of advantage is not discrimination

representation in the labour market.

\textsuperscript{24} Catherine A. MacKinnon, \textit{Sexual Harassment of Working Women}, p. 119.

\textsuperscript{25} \textit{Supra}, fn. 6, at pp. 14-5.
in reverse, but a chance for equal consideration for the first time."  

Substantive equality, or "equality of outcome",

...recognizes the possibility, indeed the inevitability, of inequality of treatment in the achievement of equality of outcome. ... It rejects "fair play" as an objective and adopts instead "fair shares". It is implicit in the objective of equality of outcome that some inequality of treatment may occur in achieving the objective, but that the significant value for equality is substantive, not procedural.

iv. A Role for Both Formal and Substantive Equality:

While substantive equality is an approach which can create real change in society, formal equality still has its proper role. A person subject to negative differential treatment because of some arbitrary, unreasonable, or unfair action by some regulation, public official, or private enterprise should be able to claim equality of treatment. For example, a white middle aged man who is refused a job because the personnel officer just doesn't want to hire a man should have a remedy for such a discriminatory (arbitrary) rejection. That remedy would be based on a claim to formal equality. This is fundamentally different from a man who is refused a job because the employer has a carefully crafted affirmative action program to overcome a history of discrimination against women. "Substantive equality would come into effect where a claim is made that a particular law [or practice] perpetuates socio-economic disadvantage."

26. Supra, fn. 24, at p. 119. She uses the phrase "differentiation theory" for formal equality and "sex inequality theory" for substantive equality. According to Marc Bossuyt, supra, fn. 9, at p. 285 the International Covenant on Civil and Political Rights permits the remedial measures part of affirmative action but "in no case may someone be deprived of a basic right under the pretext that doing so would help particular backward groups better to overcome the consequences of previous discrimination." This would suggest that the numerical remedies (also known as quotas) part of affirmative action programs would not find support under this Covenant.


The adoption of a theory of substantive equality does not imply a double standard. Clearly, one of the primary goals of disabled people is to be integrated into the community. This involves taking the same risks and same responsibilities as everyone else. A substantive approach to equality does not negate this goal. Instead, it provides a mechanism for asserting such demands as reasonable accommodation, affirmative action programs, special tax deductions and access to the built environment. A theory of substantive equality legitimizes the goal of ensuring equality of results.30

The definition of equality adopted for this thesis is situated within the context of a liberal democratic/mixed economy philosophy, modified, as suggested by Ronald Dworkin,31 to incorporate the responsibility of the community for the welfare of each of its members. The interests of disabled people are promoted by principles which empower individuals so they can make real choices about their own life options. Individual choice, including the right to try and fail, is essential for those who have traditionally been controlled by others and limited in life options by an uncaring society.

The theory, or concept, of substantive equality meets these criteria. Substantive equality seeks to achieve the reduction of economic stratification and disadvantage experienced by certain groups so that each individual may maximize the opportunity to share the benefits and opportunities our society offers. It is an approach that is able to take into account the reality that the functional limitations of disabled people may require different treatment to achieve true equality and, through its continuing ties to liberal political theory, recognizes the autonomy interests of individual disabled people.

30. Ibid, p. 11.

31. Supra, fn. 14. Dworkin criticises what he calls the "ruling theory of law" for its denial of any role for the collective interest and reliance on legal positivism and utilitarianism. He proposed a liberal theory of law which would give a primary place to individual human rights which, he said, could not be surrendered by decision of the majority for the common good. He argued the fundamental right of all people is the right to equality, which he defined as the right to be treated as an equal, i.e., with equal respect and concern, not a right to equal treatment whereby each would receive equivalent benefits, burdens and opportunities. People have this right not because of a social contract but as an essential part of their nature.
B. Approaches to Equality for Disabled People:

A failure to identify and adopt a particular approach to equality seriously diminishes the effective implementation of public policy dealing with the interests of disabled people. Stephen Percy, in his book dealing with the implementation of disability policy in the United States, reviews the three equity paradigms which have been used or argued for at different stages in the history of the implementation of s. 504 of the Rehabilitation Act, 1979. These paradigms were equality as equal treatment, equal access, and equal outcome. The first two paradigms are manifestations of formal equality theories while the third reflects principles of substantive equality. He argues that the implementation of the civil rights policy related to disabled people in the U. S. was confused by a failure to agree upon which principle of equality should be used.

The first paradigm, equity as equal treatment, is based on long standing notions of formal equality. All people are to be treated equally without regard to their individual differences; neutral standards are to be applied equally to all. The second approach, equality as equal access, is a modification of the equal treatment approach. It incorporates the need to remove obvious barriers (obstacles) to access (such as architectural barriers) and then requires the application of the same neutral standards to everyone. The third approach, equal outcomes, calls for removal of artificial barriers and, if needed to equalize outcomes, then the application of unequal treatment to disadvantaged individuals of the target groups in question so as to equalize the outcome of particular conditions between the target and non-target groups. For example, to equalize the income distribution as between the group disabled and the group not-yet disabled, quota based affirmative action in employment may be required.

Equal treatment was rejected very early but the choice of equal access or equal

outcome has not been clearly made and policy implementation has been adversely affected by ongoing argument about which option should be selected. In many cases a point somewhere between the two (idealized) paradigms has been chosen in designing specific implementation policies. Cost has been used to determine the point along the equal access-equal outcome continuum at which the objective of equality was considered to have been taken far enough.

In summary, Percy observes:

Often, then, policy debates about strategies and objectives for implementation of disability rights revolve around differing perspectives about the appropriate equity approach to be used in implementation. As would be expected, handicapped groups generally push for interpretations that favour an equal outcome approach, while regulated clients, seeking to minimize regulatory impacts, prefer an equal access approach. Debates about which approach is most appropriate will continue into the future, because of differences in the decision premises of affected parties and ambiguities in both statutes and administrative regulations. Until such time as policymakers clarify basic issues about equity approaches, thereby elucidating the bounds of disability rights mandates, policy debates will continue and affected parties will continue to use the full range of institutional arenas to affect the direction of implementation policies.  

The principles upon which disability policy in Canada may be based can be found in the Constitution and provincial human rights legislation. Section 15 of the Charter sets out the constitutional guarantee of equality. As the supreme law of Canada it may be said to be the foundation upon which all public policy must be based.

David Lepofsky suggests that this section imposes three obligations on governments. First, when devising or implementing a government program or activity, disabled people may not be singled out for disadvantageous treatment - whether by imposing burdens on them not imposed on others or by restricting them from benefits or

33. Ibid, p. 247. It is interesting to note that the Americans With Disabilities Act of 1990 is premised on a full integration model but has controlled the scope of this principle by setting out clear cost and time lines to modify the declared policy. Canadian law and policy has not grappled openly with this issue yet, although decisions by many human rights commissions clearly indicate that expansive statements of principle are severely constrained by cost concerns.

restricting their right to the opportunity to benefit from a program if an individual disabled person wants to. It is to be noted that this principle does not preclude granting benefits only to disabled people. Second, the government may not neglect disabled people. Where a disabled person is otherwise qualified to benefit from a program but is unable to do so because of the nature of the person’s disability, the administrators of the program must reasonably accommodate the disability so the person can benefit notwithstanding the disability. Included in this type of accommodation is the requirement that individuals be assessed on their own merits and not be subject to irrebuttable presumptions of incapacity. Third, the government may not forget disabled people. This creates an obligation to provide the opportunity for disabled people to be heard and an obligation to take their interests into account when formulating policy.

Equality is not only an elusive concept; it is also not the only value relevant to disabled and not-yet-disabled people. To consider only one example, while some disabled people may argue that a fully integrated city public transportation system is the only acceptable face of equality, others may argue that there are significant advantages to the door to door service provided by segregated paratransit services. In the winter, in some parts of Canada, a fully integrated system would be useless without immediate snow removal to allow the person to get to the bus stop. Some disabled people may consider the cost of full integration an acceptable social expense while others may believe that the less money in the government’s hands the better for the country. While both sides of this dispute may be arguing for equality, the precise manifestation of that equality may well be influenced by such considerations as the role of government and the level of taxation that is appropriate.

The concept of substantive equality, which I argue should be the basic principle upon which disability policy should be based and judged, does not of itself determine the face of equality in the work-a-day world. Adopting the theory of substantive equality is only the first step in determining how to describe equality for disabled people in practice.
If substantive equality means only equal outcomes then segregated services may well achieve equal outcomes. If the expected outcome of a bus ride is to get from point A to point B then a segregated transportation system can achieve that result as well as a fully integrated one. Whether the outcome of taking a university class by video connection would be the same as attending the class would no doubt be a matter of serious debate.

Substantive equality may be achieved in a number of ways depending on the circumstances of each situation, the individuals involved, and one's definition of "substantive equality". It may be reasonable to distinguish intermediate steps from the eventual ideal end point. The four processes, viewed as intermediate steps or end points, which are discussed below may be equally suited to achieving the end product of substantive equality.

i. Separate but Equal:

One option for implementing an equal outcome (substantive equality) policy is to consider the end result and measure equality at that point. In this approach, the outcome of transportation is to be moved from point A to point B. Special transportation services can be designed to achieve this objective. A balancing of inconveniences must be undertaken to measure the equivalency of the mode of transport. Door to door service offers the advantage of not having to get oneself to and from the bus stop. Against this advantage, the disadvantage of uncertain pick up time must be balanced. The equality is seen in the equal final outcome which occurs by different means.

ii. Separate and Special:

There are circumstances in which special services or facilities available only to disabled people are appropriate. An example of this is Noble House, a housing co-
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operative in Vancouver. The residents of this co-op require 24 hour a day individual care. They had been housed in an open ward at a long term care hospital where they were subject to a modified hospital ward environment. Special residences with electronic equipment designed to control TV, radio, doors, blinds, etc. were built and a full time staff of care givers is available. The residence, like a co-op housing project, is controlled and administered by the residents. This housing service is a special program designed for certain disabled people to allow them the most freedom of choice and control as possible. The equality is that the service provider has increased the life options of the disabled people by providing a special service even though it is designed to be separate from other people and available only to disabled people.

iii. Comparable Standards:

A comparable standards approach, which may also be described as program or component accessibility, does not assume a service is to be provided separately. This approach considers whether a program, viewed as a whole, is accessible, not whether each location where the program is delivered is accessible. In the United States, program accessibility was equated with the idea of reasonable accommodation pending the time when full integration was possible. For example, if a B.A. program required a particular class which was normally delivered in an inaccessible building and the cost of renovation was judged too high, it would be sufficient to provide the required class somewhere else for the disabled student.

The difference between this and the separate but equal approach is that the separate but equal approach views equality only at the end point of the process while the comparable standards approach considers each of the steps to the end point. It seeks to maximize integration within the various steps but permits some different treatment if the totality of the program can be seen to be comparable.
iv. Full Integration:

The full integration approach sees disabled people interacting side by side with non-disabled people: in every circumstance disabled and non-disabled people are integrated in the pursuit of the common objective be it moving from point A to B, attaining an education, or gaining a livelihood.

The traditional paradigms of disability as described by Rioux, supra, chapter II, are being replaced by this new paradigm of integration. The integration paradigm proposes a public policy which maximizes a disabled individual’s opportunity to be re-established in his/her community of origin. This paradigm, often referred to as "Independent Living", presupposes that disability is not primarily a medical condition but is a combination of a medical condition and the socio-economic status of disabled people. This model is based on the principles of:

- de-medicalization: It challenges the assumption that the management of a disability should be conferred on the medical profession once the acute care stage is complete. This acts to counteract the 'sickness' model which assumes the condition is temporary and can and should be cured to make the person fit society. It emphasizes independence and self-sufficiency (personal control and responsibility).

- deinstitutionalization and normalization: It challenges the practice of warehousing disabled people and replaces that with consumer controlled community based living arrangements for those who cannot live alone or need continuing support, and accessible housing and home care support for those who need a lower level of assistance.

35. Disabled Persons in Canada. These terms were in use in the 1970s and even earlier. See, for example, Gustave Gingras and E. David Sherman (eds.), Human Rights for the Physically Handicapped, and Jacobus tenBroek and Floyd W. Matson, The Disabled and the Law of Welfare (1966) 54 California Law Review 809.
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- mainstreaming: Non-segregation is the goal; moving people from institutions to the community and integrating them into a society which makes the minor accommodations required to enable disabled people to take part in community activities. It accepts the dignity of risk and possibility of failure as basic human rights.

- consumerism: It sees the consumer who requires the support service assume responsibility for determining product (service) reliability, acceptability, and desirability. It assumes the consumer (or his/her advocate) is best able to determine his/her own needs.36

Although written in the context of developmentally impaired people, the following is an apt description of the integration model:

Any new approach that successfully aims to include people with handicaps fully within society will also guarantee their basic right to maximize self-determination and personal autonomy. It will make deliberate efforts to accommodate their personal preferences and aspirations, and will put control in decision-making back into their hands and into the hands of their family and friends. It will also make provisions ensuring that the individual and his or her personal network receive the supports they need, so they can arrive at informed and prudent decisions about how to satisfy individual needs in a natural and cost-effective way in the community. In order to achieve these goals, there needs to exist more flexible structures which will address needs on a person-by-person basis. These structures will have to be accountable to individuals and their networks, and will regard their needs before those of the service systems.37

Segregated services foster isolation, rejection, loneliness, oppression, exploitation, anxiety, and fear. Apart from the benefits for the individual disabled person, the integration approach benefits the community which gains from the rich and diverse contribution of all individuals; conversely, the community is diminished if some of its members are excluded. "Inclusion" (integration) is a value based approach designed to

36. Marcia H. Rioux, *Labelled Disabled and Wanting to Work*, Research Studies of the Commission on Equality in Employment at pp. 626-7. See also tenBroek, *ibid*, at p. 841: Public policy toward disabled people should be based on a policy of "integrationism": the article discusses how tort law affects the ability of disabled people to access transportation, public services, etc.

avoid devaluing people and continuing a permanent underclass in society.  

C. Limitations to Equality Claims:

A disabled person who relies on the use of a wheelchair may make a claim to a right, in the name of equality, to be able to use a municipal transportation system in the same way as people who can walk onto the buses. This would require that all the buses be wheelchair accessible. Other users of wheelchairs may argue that they prefer a separate paratransit system. These users may be criticizing the first equality claim because they have a different view of what form equality should take. Other residents may agree with the principle but argue that costs will be prohibitive. This criticism is based on the claim that other equally valid interests outweigh the claim to equality. Still others may argue that the claim to the right is invalid; that the alleged right should not be recognized.

After a claim of right has been recognized as valid, inquiring into the limitations which may be placed on that right is another way of asking when equality rights may be subsumed to other rights and interests of individuals and society.

Pursuing a claim to a right to equality under the Charter requires that the right first be recognized. Then s. 1 provides a clear mechanism to limit that right.  

Pursuing a claim to a right to equality under human rights legislation requires agreement with the proposition that the denial of the alleged right amounts to discrimination within the meaning of the legislation. There are three different ways to limit the right depending on the particular wording of the legislation in question. First, the legislation may provide a specific exemption for the circumstances in question.

40. See chapter 5.
Second, most human rights acts contain general limitations referred to as *bona fide* occupational requirements (or similar words) for employment or *bona fide* justifications (or similar words) for services. Third, where a statute fails to provide a limitation mechanism the courts will read one in.\(^{41}\)

An equality claim may be defeated by some overriding right or interest if the two cannot co-exist together.

Recognizing and acting on an equality right recognized by law or by social policy often costs money. In other words, it requires changing resource allocations. The necessity of choosing how to distribute scarce resources leads to the making of tragic choices.\(^{42}\) In the context of disability rights this means that some disabled people will have their needs met and others will not or not sufficiently to alleviate all disadvantage. As with all distributional choices, the choices related to disability issues are constantly seeking a new equilibrium as demands are met, new ones are made, other social demands put pressure on the resources dedicated, and the overall economic situation affects total resource availability. Allocation decisions are reflected in decisions about the extent of accommodation which will be deemed reasonable and the categories of people or categories of rights which will receive the protection of the law.\(^{43}\)

The natural tension between regulated clients and program beneficiaries is played out as they both endeavour to affect the direction of and responsibilities mandated by implementation. Neither side is likely to stay satisfied for long with existing policies, and each new question - whether about including a new group under non-

\(^{41}\) See, for example, *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536, 7 C.H.R.R. D/3102, in which Mr. Justice McIntyre "read in" the concept of reasonable accommodation subject to undue hardship to deal with an Ontario statute that contained an absolute prohibition of discrimination because of religion.

\(^{42}\) Guido Calabresi and Philip Bobbitt, *Tragic Choices*. The "tragic choice" is a choice which is made that implies a rejection of a proclaimed fundamental value of the society. The choice must be made because it deals with an essential requirement of society but it conflicts with basic values. Societies try to avoid making these choices by an allocation system which hides the essential tragedy. As the allocation system's failings are socially acknowledged the response is to change the allocation system since the choice still has to be made. The primary examples used are the resource decisions about kidney machines and child bearing.

discrimination protection or requiring a new form of accommodation - will resurrect struggles between opposing groups.\textsuperscript{44}

This is no permanent equilibrium among the various claims of right to equality. Although there may have been long periods of social stability during which an equilibrium was maintained, we are currently in a period of rapid social change. Although it may be impossible to achieve total equality, public policy should be directed toward striving for equality by the progressive reduction of economic stratification and individual and group disadvantage.

In the next chapter I will review the development of current official policy respecting disability interests. Since there are gaps between policy and practice I will review a theoretical model which purports to explain why there are always difficulties in trying to implement any policy change and give a brief overview of one example.

\textsuperscript{44} \textit{Ibid}, p. 254.
IV. OFFICIAL POLICY TOWARD DISABLED PEOPLE:

Public policy related to disabled people has changed significantly during this century. Beginning in the 1960s, the policy of deinstitutionalizing mentally ill people spread quickly across the country. Mentally and physically disabled children began to be integrated into the public school system. By the mid-1980s provincial and federal governments had adopted the integration model as the basis for their official policy towards disabled people. This policy shift occurred at different rates in the development of health, education, and human rights policies and in the various provinces but the shift has been consistent and increasingly is reflected in programs and services for disabled people. The federal government's announcement in 1991 of a National Strategy for the Integration of Persons with Disabilities is the most recent manifestation of this fundamental shift in public policy towards disabled people.

A. Integration as Official Policy:

Since the late 1960's Canada has been moving toward the integration model as the foundation for government policy respecting disabled people. The process started with the deinstitutionalization of mentally ill patients. In the field of education the adoption of the integration model began a process of placing mentally and physically disabled children in regular classrooms with the help of auxiliary aids and programs. Over a ten year period human rights legislation was amended to prohibit discrimination because of mental and physical disability. To the economic and medical/technological pressures for integration was thus added the civil rights argument. In 1980 a special House of Commons Committee held hearings across the country and, in 1981, published its report, Obstacles. The Committee noted the disadvantaged position of disabled people in society and made many wide ranging recommendations for improvement. The Charter of Rights
and Freedoms guaranteed equality without discrimination because of, inter alia, disability.

With the announcement by the federal government of a National Strategy for the Integration of People with Disabilities, integration has been adopted as official government policy for the formulation of programs directed to disabled people.

After almost twenty years of progress towards integration disabled people are still significantly disadvantaged by their segregation and isolation. After discussing some reasons why, despite change in public policy, progress towards integration and the reduction of disadvantage is so slow this chapter concludes with a brief review of disabled people’s political action initiatives.

i. The Policy of Deinstitutionalization:

The decade of the 1970s was a time when large scale closing of mental institutions occurred in Canada and the United States. One of the initiating factors for this movement was the discovery and widespread use of tranquillizing drugs in the 1950s which allowed more patients to return to the community on medication. The deinstitutionalization movement began in the early 1960s in California and spread quickly in the two countries. Under pressures arising from U.S. legislation limiting the use of involuntary committal, budget cuts, and changing theories about optimum treatment approaches, the initial stage involved transferring patients from large scale state mental health institutions to nearby general hospitals. Soon after, further deinstitutionalization occurred with the development of community living approaches to therapy, half-way houses, and other after care facilities (after treatment for acute episodes in hospitals). 1 As in the U.S., in Canada, the closing of large centralized institutions for mentally ill and developmentally delayed patients followed the change from custodial to therapeutic approaches to care and

treatment, from therapies such as electro-shock and lobotomies to drugs and, later, behavioral modification. An example is the closing of the Saskatchewan Hospital in Weyburn in 1971, fifty years after its opening. Care and treatment of the residents was transferred to comprehensive small community mental health centres.\(^2\) Initially, the process was not based on a concept of the rights of the patients or an ideology of integration into the community to promote and protect the human rights of patients. It was, rather, a combination of a reflection of society's faith in mental health experts and the mental health professions' rise in power and influence. They were developing theories that this approach was a better treatment regime and wanted it to be implemented.\(^3\) Additional pressure was exerted by community groups of interested people or present and past consumers of the services. As well, the widely touted savings of community care over the expense of maintaining the often outdated facilities added the support of the public officials concerned with mounting expenses of government.\(^4\)

The policy change to deinstitutionalization of mentally ill and developmentally delayed individuals was clearly and firmly entrenched by 1970-71 in Canada. At the same time the increase in the number of psychiatric units in general hospitals and the provision of family support programs so disabled children could receive their primary care from their families supported the movement to replace the large institutions. However, the implementation of the new policy was frequently inadequate. Closures happened without adequate notice to allow local authorities to plan alternate service delivery and lack of data to allow adequate planning and inter-departmental coordination contributed to cases of extreme hardship and failure to obtain care and treatment for many thousands of ex-

\(^2\) Milton Greenblatt, *Historical Factors Affecting the Closing of State Hospitals*, in Ahmed and Plog, *ibid*, p. 11.


\(^4\) Greenblatt, *supra*, fn. 2, p.16. Paul R. Dingman, in *The Alternative Care Is Not There*, in Ahmed and Plog, *supra*, fn. 1, p. 46, argues that cost was the primary reason the states began to close the large institutions.
residents. There has been criticism of the policy of deinstitutionalization based on factors ranging from the failure to prepare adequate alternative community support for the individuals to concerns that the theoretical underpinning of the therapeutic value of community living has not been proven. Despite this, deinstitutionalization has been adopted as the paradigm of choice and accepted politically without challenge. There remains very strong professional and grass roots support for the concept. In the last half dozen years there has been strong, ongoing pressure for the acceptance of this revised paradigm in which decentralized services are provided as part of an ideology of integration as a matter of human rights and also within the concept of a holistic, multi-party (composed of professionals, self-help groups, community support groups, and politicians) community ownership of the problem. And yet, even by 1987 the greatest share of public money spent on the needs of mentally ill and developmentally delayed individuals was taken by institutions, not community based alternative care facilities.

Deinstitutionalization has also fundamentally changed the special education services provided for disabled children ("exceptional children" in education jargon). While integration into the regular school system is the objective, many different strategies are being used, including "deinstitutionalization, integration, non-categorical approaches to teaching, and a rejection of traditional labelling." The objective of integrating disabled children into the regular school system (referred to as "mainstreaming") is to provide children with learning, behavioural, developmental, and physical disabilities with the

5. Agenda for Action: Committee on Mental Health Services in Ontario, pp. 153-59 and 305-310.
opportunity for "as normal an education as is consistent with their needs." 9 These children must be integrated into the physical as well as the intellectual, social, and emotional milieu of the local school.

Mainstreaming may prove to be a more restrictive environment if exceptional children are debased by their peers, socially isolated and poorly accepted. Socially, exceptional students in the regular schools must have the same access to the various school programs and activities as other students; they must be provided with equal opportunities for participation within the regular classroom. 10

Effective mainstreaming requires a re-allocation of special education services to meet the widely varying needs of these children. Some will require substantial home or hospital based education while others may need only special support staff while in a regular classroom. Similarly, a particular child's needs may change over time so that a "cascade" of services must be available to serve the needs of that child as he/she develops and progresses through life. "The ultimate goal is for students to move as far into the regular programs as possible, being integrated socially, emotionally, intellectually and physically." 11

Mainstreaming is not, however, universally accepted by parents of disabled children or education professionals as the most suitable educational approach. Some fear their child will not receive the personalized attention segregated special education classes can provide: others fear their child will be ridiculed and rejected by the other children in a regular classroom. 12

9. Winzer, ibid, p. 84.
10. Ibid, p. 84.
11. Ibid, p. 87.
12. Ibid, p. 90. See also Anne Jordan Wilson, Ontario's Bill 82 in Retrospect, in Csapo & Goguen, supra, fn. 8, at p. 91. For an example of serious criticism of the mainstreaming concept see Marfo & Nesbit, supra, fn. 8, at p. 181 where it is said:

... the movement towards regular class placement for all handicapped children is driven largely by human rights concerns ... These concerns have been expressed, and in some cases exploited, to promote regular class placements for all, often without regard for sound principles of instruction and learning.

As one example, many deaf people are criticizing the mainstreaming of deaf children and the insistence that they learn to lip read. Presentations to the Illinois Advisory Committee to the U.S.
Although the principle that all children have the right to equal educational opportunities applies to all provincial school systems, the means to this end vary among the provinces. In some (eg: Ontario, Manitoba, and B.C.) legislation, and in others (eg: Nova Scotia, Prince Edward Island, Saskatchewan) department of education policy requires that school boards provide education to all disabled children. The requirement that school boards provide an appropriate education to all disabled children does not mean that such education must be provided in an integrated setting. However, it does compel "schools to move toward mainstreaming and individualized education programs for the protection of each child with special needs."

The degree to which mainstreaming is mandated varies among the provinces and among local school boards, depending to a great extent on the perception of the local authorities about the cost and available resources and differing attitudes towards the effectiveness of integrated education for disabled children.

In addition to legislative changes requiring integrated education, in many instances parents have initiated litigation to force local school boards to allow their children to participate in the regular school system with appropriate supports. These cases typically use a combination of education and human rights law and Charter arguments.

Commission on Civil Rights (Rights of the Hearing Impaired) objected that this approach denied the deaf child's civil rights to an effective education. Many deaf people argue that sign language is the native language of deaf people, that integration in a regular classroom is to deny the child's "deafness", and that only by coming together in special schools for the deaf can a deaf peer group form to prevent social isolation. Studies presented to the Committee showed that despite the provisions of the Rehabilitation Act, 1991 the number of special schools for the deaf had increased from 6 to 102! For others, however, the proliferation of special education specialists is a socio-economic phenomenon which merely perpetuates a system which relegates poor, disadvantaged, and minority group children to a permanently exploited under class. See David A. Leitch & S.S. Sodhi, The Remediation Hoax, in Csapo & Goguen, supra, fn. 8, at p. 267.

16. Winzer, supra, fn. 8, p. 111.
The ideology of deinstitutionalization and integration was first implemented in practice for mentally ill people and developmentally delayed children in schools. The driving forces influencing governments to adopt this new approach were the claims about the cost-benefit to the public purse and the therapeutic benefits of integration. By the mid-1970s physically disabled adults were also contributing to and benefiting from this ideology. These adults began to form consumer groups as self-help organizations to support their efforts to take control of their lives. Soon after, these consumer groups began to argue successfully that integration was a basic principle of their human rights.

ii. Human Rights Legislation:

The 1973 British Columbia Human Rights Code prohibited discrimination "without reasonable cause" in employment. A Board of Inquiry held that physically handicapped individuals were protected under the Code because the mere fact of having a handicap could not be a reasonable cause to discriminate against a person in employment. This was the first time human rights legislation had protected disabled people. In 1976 New Brunswick was the first province to add "physical disability" to its human rights legislation as a prohibited ground of discrimination. In 1977 Manitoba added, and the just passed Canadian Human Rights Act included, "physical handicap" as a prohibited ground of discrimination. Other provinces followed with Ontario, the last province to do so, adding (mental and physical) "handicap" in 1981. The report of the

House of Commons Special Committee on the Disabled and the Handicapped urged the extension of human rights legislation protection against discrimination by covering physical handicap in all sectors and by the addition of mental disability in all sectors. The Canadian Human Rights Act was amended in this fashion effective July 1983. The provinces which had not already included mental disability as a prohibited ground of discrimination rapidly followed suit just before and after section 15 of the Charter of Rights and Freedoms came into force in April 1985.

iii. The Obstacles Report:

The Report of the House of Commons Special Committee on the Disabled and the Handicapped (1981) proposed three principles upon which social policy related to disabled people should be based:

- Participation: Disabled Canadians must have the same opportunity to participate fully in all of the educational, employment, consumer, recreational, community and domestic activities which characterize everyday Canadian society.

- Responsibility: All Canadians are responsible for the necessary changes which will give disabled persons the same choice of participation that are enjoyed by those who are not disabled (sic).

- Self-Help: Disabled Canadians are often best able to help themselves through their own service and advocacy organizations.

In the report the Committee makes recommendations designed to achieve the following objectives:

- Achievement of adequate income
- Support for promotion of self-help efforts.
- Provision of technical aids, and community support services such as attendant care and intervenor services.
- Equal benefits and protection under the law.

22. Obstacles, pp. 131.
• Equal opportunity of access to public buildings, facilities and programs.
• Equal access to a full range of opportunities in
  • Employment
  • Housing
  • Education
  • Transportation
  • Recreation
  • Communications and Information
• Provision of community support services to reduce or eliminate the need for institutional care.
• Improved quality of life for disabled persons who live in institutions.²⁵

iv. Federal Government Employment Policy Initiatives:

The federal government made a policy decision in 1978 to initiate a program to increase the employment options of disabled people in the public service. The formal policy statement was approved in 1981! The policy permitted departments to purchase technical aides and directed departments to make extra efforts to hire disabled people and provide career development opportunities for then currently employed disabled people. All departments were required to submit annual reports on their progress to Treasury Board. Regional offices of the Public Service Commission established special units to provide individualized service to disabled people seeking employment and, in 1985, a special pool of person years was established that departments could draw upon to hire disabled people for a period of training and integration to the work place. In addition, the federal government initiated a pilot program of affirmative action in five departments which included disabled people as one of the target groups. A separate pilot project for the hiring of mentally disabled people was established in 1982.²⁶ Affirmative action including the disabled as a target group was made part of the application process for all federal employment programs in 1982 when the various job creation programs were

²⁵. Ibid, p. 5.
combined into the Canada Jobs Strategy.

These initiatives were designed by Treasury Board without the support or enthusiasm of line departments. Implementation was haphazard and depended on the interest of individual line managers and personnel officers. While no doubt a few disabled people obtained jobs of longer or shorter duration, these initiatives represented only the first uncertain response to the newly emerging disability rights movement.

v. Inclusion of Disability in Section 15 of the Charter.

Section 15 of the Proposed Resolution respecting the Constitution of Canada, presented to Parliament on October 6, 1980, entitled Non-discrimination Rights, provided for "the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex."27 The exclusion of disabled people was deliberate.28 This exclusion was severely criticized across the country. Calls for inclusion of disability as an enumerated ground were heard in the numerous public forums which discussed the proposals, the media, and letters and petitions. At this time the Special Committee of the House of Commons on the Disabled and the Handicapped was holding its hearings across the country. The issue of the inclusion of disabled people in the Constitution was raised frequently. The Council of Canadians with Disabilities, the Canadian Association for the Mentally Retarded, and the Canadian National Institute for the Blind, supported by a wide range of other public interest groups, made the argument for inclusion of disability directly to the Special Joint.


There were a number of arguments presented to the Joint Committee in support of including "disability" as a specified ground. The Obstacles report included the recommendation based on the evidence it had collected in its cross country hearings that there were significant examples of discrimination against disabled people, whether intentional or not, by private and public agencies and in provincial and federal legislation. It was said that not to include disability would indicate that equality rights for disabled people were less important than for other groups. There were significant numbers of disabled people and so the addition would not just be for a few people. Canada had international obligations respecting the protection of the rights of disabled people to fulfil, and it was noted that 1981 was the United Nations' International Year of the Disabled Person.

The government's resistance to inclusion of disability in the list of grounds was based on three considerations. First, the term was too vague and would pose serious problems of judicial definition. The Minister of Justice argued "these rights may not have 'matured' in the minds of the public, [and] there would be a problem in defining the population to be protected and the rights involved." Second, the question of cost was raised. However, no evidence on this matter was presented. And, finally, the government argued that the statutory human rights scheme was a more appropriate forum to protect the rights of disabled people, again without presenting evidence to support this view.

In response, witnesses to the Committee noted that the definition problem was no greater than for other terms which were included and, if desired, several definitions which

29. Formerly known as the Coalition of Provincial Organizations of the Handicapped (COPOH). COPOH lead a march on Parliament Hill in 1980 to urge inclusion of "disability" as a specified ground under s. 15 of the Charter.

30. Lepofsky and Bickenback, supra, fn. 28, pp. 335-8.


had proven their worth could be used. Respecting costs, it was opined that this was not a real objection and, in any event, in many cases, costs would be reduced when disabled people were integrated into the community. In addition it was objected that to circumscribe the rights of disabled people because of costs assumed that disabled people were the lowest priority of governments and subjected their rights to a cost/benefit analysis which applied to no other protected group. In response to the statutory human rights schemes argument, it was noted that much of the discrimination rose from legislation itself and that these schemes could be altered at will by the various legislatures.33

On January 12, 1981, the government proposed a number of changes to the resolution. Section 15 was amended to add "and the right to the equal protection and equal benefit of the law without discrimination" and the list of grounds of prohibited discrimination was made open ended by the words "without discrimination, and in particular, without discrimination based on . . ." the same list of seven grounds. The Minister of Justice made it clear the issue of disability was considered but not adopted by the government. The Minister noted that if discrimination was found to exist the open ended list would permit the courts to intervene.34 On January 16, 1981 the Minister was asked by the Joint Committee if, considering 1981 was the International Year of the Disabled Person, the government would reconsider its refusal to add disability to the list of grounds. On January 28, 1981 the Minister of Justice agreed to the amendment35 and the provision was included in the February 13, 1981 draft of the proposed resolution which was eventually enacted.36

34. Ibid, p. 334.
35. Ibid, pp. 334-5.
36. Bayefsky, supra, fn. 27, p. 10.
vi. The Employment Equity Act:

In 1983 the Royal Commission on Equality in Employment was established to review the employment position of women, aboriginal peoples, disabled people, and visible minorities. In her report Commissioner Judge Rosalie Abella proposed that "a new term, 'employment equity', be adopted to describe programs of positive remedy for discrimination in the Canadian workplace." This term was intended to avoid the negative emotional context of the American term 'affirmative action'. Judge Abella said: "No great principle is sacrificed in exchanging phrases of disputed definition for newer ones that may be more accurate and less destructive of reasoned debate."37

The federal Employment Equity Act38 came into force on August 13, 1986. Section 2 provides that:

The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

The Act applies to federally regulated private and Crown Corporation employers employing 100 or more persons but not to any employer undertaking work of a local or private nature in the Yukon Territory or the Northwest Territories or the government. Designated groups are described in section 3 as "women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada." Section 4 requires an employer

39. S.C. 1986, c. 31. In 1993 Ontario passed legislation to implement employment equity for both government and private employers and British Columbia enacted the Public Service Act which permits the implementation of employment equity in the public service.
in consultation with such persons as have been designated by the employees to act as their representatives or, where a bargaining agent represents the employees, in consultation with the bargaining agent to implement employment equity, by identifying and eliminating barriers to employment, and instituting "positive policies and practices" to ensure that persons in the designated groups will achieve a representation proportional to their representation in the labour force. The regulations define "consultation" to mean "that the employer must supply sufficient information and sufficient opportunity to employee representatives or bargaining agents to enable them to ask questions and submit advice on the implementation of Employment Equity". Employers are required to prepare an annual "action" plan, including goals and timetables. Starting in June 1988, and annually thereafter, employers are required to submit to the Canada Employment and Immigration Commission (CEIC), which will forward a copy to the Canadian Human Rights Commission (CHRC), reports about hiring, promotions, and terminations according to industrial sector, geographic location, and employment status by occupational group and salary range for designated and non-designated group employees. Failure to do so is a summary conviction offence and may result in a fine not exceeding $50,000. Copies of these reports are also made available to the public through selected public libraries.

In practice, consultations with unions have been neither frequent nor effective. There is fault on the side of the unions for not demanding their right to be consulted and on the side of employers for neglecting to consult.

There are no penalties for failure to fulfil the requirements of the Employment Equity Act, except for failure to prepare and forward a workforce census. Initially the government believed that negative publicity arising from reports which showed under-representation would be sufficient incentive for employers to voluntarily take corrective action. This provoked vigorous criticism. The CHRC declared its willingness to take on the role of an enforcement agency by using its authority to initiate complaints based on the data collected through the workforce censuses. The government amended the bill to
provide for the transfer of census reports to the Commission.

Each year the CHRC reviews all the reports and, based on rather imprecise selection criteria, invites a number of employers to enter into a "voluntary review" of their employment systems. In co-operation with the employer, the Commission reviews the workforce data, employment systems analysis, and employment equity plan. An agreement to end the joint review is achieved when the Commission is satisfied that the plan will be effective to correct underrepresentation in the workforce. Individuals may also file complaints based on the data. In such cases an investigation is conducted by the Commission. The process of investigation is essentially the same as that of a voluntary review.\(^{40}\)

Although the federal government is not subject to the *Employment Equity Act*, it has directed departments to produce statistical reports and prepare plans as required by the Act.\(^{41}\) The policy does not require consultation with public service unions.

vii. The Federal Contractors Program:

The Federal Contractors Program was established in October 1986 by Cabinet order. Companies employing 100 or more employees and bidding on contracts worth $200,000 or more must, as part of the bidding process, commit themselves to implement employment equity if they are successful. Failure to comply with employment equity measures can lead to loss of the opportunity to compete for future contracts. Companies

\(^{40}\) *Operational Procedures for Ensuring Compliance with Employment Equity*, Canadian Human Rights Commission. By November, 1993, 10 reviews under the Act, 11 reviews of government departments, 30 complaints under the Act, and 28 complaints against government departments have been undertaken (representing 65.5% of all employees covered by the legislation). Since the government is not covered by the Act, these reviews and complaints are based on the Commission’s general power to investigate complaints of systemic discrimination. Eleven reviews and thirteen complaints have been completed.

bidding on contracts must certify their commitment to employment equity implementation when they submit the bid. Upon award of the contract, the company must implement the same type of employment equity plan as required by the *Employment Equity Act* and authorize CEIC officers to review the implementation of the program. CEIC officials based in Ottawa will assess compliance and measure performance levels. If the review results are negative the contractor has 12 months to correct the identified deficiencies. Companies dissatisfied with the CEIC audit may appeal to the Minister of Employment and Immigration. Failure to comply with CEIC directions to rectify deficiencies may lead to sanctions, including eventual exclusion from bidding on future contracts.

Despite the close relationship to the other requirements of the *Employment Equity Act*, the contractors program does not require consultation with the companies’ unions.

viii. National Strategy for the Integration of Persons with Disabilities:

Throughout the 1970s and 1980s many private and public entities had been responding to the equality expectations of disabled people by adjusting policies, developing technologies, or opening educational, employment, and recreational opportunities. The process of implementing the recommendations of the 1981 *Obstacles* report progressed slowly throughout the 1980s. But there was no concept of a national policy to coordinate the activities of the various levels of government and the private sector to maximize the rate of change.

Even without any coordinated plan, progress was being made on many fronts. Transport Canada has been actively working on problems related to access to various modes of transportation, access to and from airports and access within airports, and has been funding and coordinating research on bus loading devices, model accessibility projects, and the development of public communications systems to allow disabled
travelers the same service system as non-disabled people. Technological advances in telephone communication devices are continually being made and telephone companies generally allow discounts for, or free use of the equipment by, disabled people. Relay services for deaf consumers exist in most companies, although the restrictions and limitations of the service do not allow equal access to the service available to non-disabled consumers. However, equipment for deaf and hard of hearing, vision impaired, and movement impaired consumers is available and being improved. BC Transit, the Vancouver public transit system composed of bus, skytrain, and seabus services, is significantly integrated and working to complete the process. It also runs a special service for those unable to use the existing system or living too far from an accessible service. But, in contrast, the number of accessible subway stations in Toronto remained at zero between 1981 and 1991 and the number of accessible inter-city buses in Ontario remained at zero in the same time frame. Maclean Hunter Cable TV began a Closed Caption Decoder Program in May 1991 in all its Ontario systems, and Rogers Cablesystem in Ottawa did the same with plans to expand the services of all its customers in British Columbia, Ontario, and Alberta by the spring of 1992 (about 95% of prime time U.S. and Canadian television is captioned), but Metro Toronto taxi services have not taken advantage of provincial funding to ensure an accessible taxi service. In 1989 the Manitoba government issued a policy on accessibility to public meetings and hearings, government services, publications.

On September 6, 1991, in Winnipeg, the Prime Minister announced the federal government's "National Strategy for the Integration of Persons with Disabilities". The

43. Arch-Type, V. 9 # 3 April-May 1991, p. 18.
44. Ibid, p. 25-6.
Prime Minister said "Persons with disabilities neither ask for special sympathy nor expect special privilege; all they ask for is equal access." This National Strategy is based on three goals: "equal access, economic integration, and effective participation [to] bring people with disabilities into the social and economic mainstream of Canadian life." The Department of the Secretary of State has a lead role to coordinate the work of ten federal government departments: The Department of the Secretary of State, Canadian Mortgage and Housing Corporation, Department of Communications and National Library of Canada, Employment and Immigration Canada, Health and Welfare Canada, Fitness and Amateur Sport, Indian and Northern Affairs Canada, Department of Justice, Labour Canada, Transport Canada, National Transportation Agency, and Treasury Board Secretariat.47 The Strategy encompasses issues related to access to employment, training, housing, communications, transportation, public sensitivity, and community integration. "The government strategy recognizes that barriers to the full participation of persons with disabilities are complex and interrelated".48

A flurry of activity to introduce this program followed the Prime Minister's announcement. Fitness and Amateur Sport announced a program, "Active Living for Canadians with a Disability: A Blueprint for Action", "to facilitate the inclusion of students with disabilities in appropriate physical education/activity opportunities".49 The Department of Communications established the "Advisory Committee on Communications for Persons with Disabilities" to advise the Minister on "communications related actions needed to facilitate the integration of persons with disabilities. . .".50 Labour Canada established the "Workers with Disabilities Fund"

47. Many of the names of these departments changed as a result of a government reorganization near the end of 1993.
which includes "consultations . . . to identify possible barriers in the legislation and regulations [of the Canada Labour Code], and improve access to employment for people with disabilities." During the same time span, the other departments also announced department specific program initiatives directed toward the integration of disabled people.

B. The Slowness of Change:

i. Is the Change Slow?

The House of Commons Committee on the Disabled and the Handicapped stated in its 1981 report:

In comparison with the efforts being made in other countries, Canada shows poor progress in assisting disabled persons in the areas of employment opportunities, income security, community support services, and technical aids. The Members can find little reason for this situation other than lack of direction and coordination on the part of government, institutional, and community leaders who have the power to make changes. There are no insurmountable obstacles to prevent Canada from taking a world leadership role in providing disabled persons with the practical means for greater independence.

The Canadian Human Rights Commission has undertaken a number of surveys to determine the effectiveness of current access law and policy.

The first survey dealt with physical access to federal government departments. The survey was based on compliance with the Canadian Standards Association CSA B561 "Barrier-Free Design Standard". With a score of 100 representing full compliance with the Standard the offices ranged from a low of 24.62 (for the hard of hearing in the Health and Welfare office in Halifax) to a high of 92.06 (for the blind in the Health and Welfare

52. Obstacles, supra, fn. 22, p. 6.
office in Vancouver). The average rating for all disabilities and all offices was 62.94. The CEIC average of all disabilities by office was: Halifax - 63.96, Montreal - 54.71, Ottawa - 67.78, Toronto - 50.36, Winnipeg - 68.54, Edmonton - 76.13, Vancouver - 71.12. The CHRC average of all disabilities by offices was: Halifax - 54.95, Montreal - 49.52, Ottawa - 63.72, Toronto - 60.98, Winnipeg - 48.81, Edmonton - 63.72, Vancouver - 60.98. The HWC average of all disabilities by office was: Halifax - 50.12, Montreal - 68.08, Ottawa - 75.66, Toronto - 62.29, Winnipeg - 61.24, Vancouver - 77.80. The PSC average of all disabilities by offices was: Montreal - 68.79, Ottawa - 56.50, Toronto - 66.65, Winnipeg - 69.09, Edmonton - 70.03, Vancouver - 53.22. The Revenue Canada - Taxation average of all disabilities by offices was: Halifax - 55.97, Montreal - 69.81, Ottawa - 55.41, Toronto - 64.80, Edmonton - 70.51, Vancouver - 62.83.

The Obstacles Report recommended a 1983 deadline for federal government buildings to be fully accessible. The government’s response was that new buildings would meet barrier free access standards and that standards were being developed for existing buildings. Treasury Board has had a policy of requiring access to its services since 1982 and there have been barrier-free design standards on accessibility within government since 1985. Compliance with accessibility standards varied with type of disability: (average of all facilities) Mobility impaired non-wheelchair users - 67, mobility impaired wheelchair - 66, low vision - 63, blind - 59, deaf - 53, and hard of hearing - 48.

The second report of the "Unequal Access" series dealt with the availability of government publications in alternative format. For the 552,585 adult Canadians who are visually impaired lack of access to the information available to other Canadians in print format is a serious barrier to their full participation in society. Alternate formats refer to information in large print, audio cassettes, braille and alternative output devices

54. Since 1981 the federal government has had "a mandatory provision" that all CEIC leased premises by accessible to all disabled people. A needs study was completed in 1982. (supra, fn. 26, p. 29).

The survey covered 48 departments and agencies. It may be noted that the 1981 *Obstacles* report recommended that a national communications policy be developed to ensure equal access to information and that in the 1983 government response it was reported that Treasury Board had directed all federal departments and agencies to set aside up to 1% of their total publicity budget to produce and distribute materials in alternate formats. Current Treasury Board policy requires departments to make materials available in alternate formats within the same general time frames as for printed materials. Nearly 60% of the departments surveyed had no publications in alternate formats. These included CMHC, CBC, Consumer and Corporate Affairs, Elections Canada, Fitness and Amateur Sport, Information Canada, Justice, Occupational Health and Safety, Revenue Canada - Customs, the Status of Women, and the Transportation Safety Board. The CHRC, CEIC, Health and Welfare, Labour, NTA, PSC, and revenue Canada - Taxation had some materials available. 80% of the departments had no alternate format policy (including at the time the CHRC), 40% had no alternate format publication plan, and 45% had no alternate format marketing plan. The lack of a marketing plan means that what little information is available is not known by the consumers to be available and so they do not ask for it. This low level of demand reduces the interest in the departments in producing the materials. This endless cycle has to be broken by the departments which have the responsibility to service the public.

The third report of the series "Unequal Access" dealt with the availability of


57. See, for example, *Manitoba's Guidelines on Access to Government: Publications Public Meetings and Hearings Services*, 1989. Information is to be provided in alternate formats but preparation depends on expected demand. Information thought to be of interest to disabled persons should be prepared in alternate format at time of general production. Other information may be made accessible in amount and format by agreement with the person requesting the information. Once material has been produced in alternate format a copy "should" by filed with the Legislative Library for use by others. Costs are to be the same as those charged all others. Public meetings sponsored by the government "are made reasonably accessible" to the disabled. Sites "should" be wheelchair accessible; specific arrangements for the deaf and hearing impaired may be provided upon request only. Government services, such as family dispute counselling, medical, training courses, are to be provided to deaf and hearing impaired citizens.
Telephone Devices for the Deaf (TDD) by Federal government departments. In August 1986 the Secretary of the Treasury Board wrote to all Deputy heads of departments and agencies to "ask them to ensure that: ... the hearing impaired are afforded full telecommunications access at each major source of public information now available to the non-disabled." In June 1987 the Telecommunications Group of the Department of Communications asked for public input on how to improve access to telephone received advice and information for deaf and hard of hearing people. A random check of listed federal TDD numbers by the Canadian Coordinating Council on Deafness in 1988 found 85% of TDD calls could not be completed. The CHRC study involved 55 offices representing 31 federal departments and agencies. 31% responded on the first call, 34.5% never responded, and only 43.6% responded within three calls. Canadian Human Rights Commission regional offices required from 1 to 6 calls before responding. CRTC, CEIC, Labour Canada, and the RCMP all replied on the first call. Agriculture Canada, CSIS, Department of Justice, National Defence, Transport, and Veterans Affairs never responded. Some regional offices never answered and others answered after 1 or 2 calls in Health and Welfare, the PSC, Revenue, and Statistics Canada. Of the nineteen TDDs that were not answered the departments provided the following explanations: 6 because the telephone book listing was incorrect, 5 because the TDDs were being repaired, 5 thought their machines were working and said they would check, and 3 departments insisted their machines worked and would be answered despite the survey not getting through after 6 tries.

The fourth report of the series "Unequal Access" dealt with banks. A snapshot sample of 7 branches (one in Halifax, Montreal, Ottawa, Toronto, Winnipeg, Edmonton,

59. Ibid, p. 3.
and Vancouver) of six major Canadian banks was done. The average accessibility index for all disabilities was Bank of Montreal - 74.76; CIBC - 76.93; National Bank - 71.79; Royal Bank - 80.44; Scotiabank - 74.89; Toronto Dominion - 75.15. The results by disability ranged from a low of 12.09 for access by wheelchair users in an Ottawa Bank of Montreal to 96.05 for access by deaf people in a Vancouver Bank of Montreal. The average access index by disability for all the banks was deaf - 80.25; hard of hearing - 75.83; blind - 72.65; low vision - 76.15; mobility wheelchair - 73.17; mobility non-wheelchair - 75.89. Banking services were delivered in various types of structure. The average accessibility index of all banks by all disabilities in these structures was; Main branch - 72.80; major shopping centre - 77.44%; strip shopping centre - 77.59; free standing suburban - 75.28%; older freehold - 74.04.

The fifth report of the series "Unequal Access" dealt with Canada Post outlets61. The Commission used the Canadian Standards Association standard for these surveys. Many of the postal outlets met the provincial building code requirements but not the CSA standard. The survey of 2 outlets in seven cities gives a snap shot view: it is not suitable for statistical extrapolation. It covered the public access areas only. A rating of 100% denotes full compliance with the CSA standard. The average result for all disabilities for all offices was 78.35%. The average by city was: Halifax - 79.09; Montreal - 70.62; Ottawa - 88.47; Toronto - 74.81; Winnipeg - 78.69; Edmonton - 68.45; Vancouver - 88.33. The results by disability ranged from a low of 50 for deaf people in Montreal and Edmonton retail outlets to 100% for blind people in the Vancouver retail outlet. The average by disability for all outlets was deaf - 70.71; hard of hearing - 78.00; blind - 81.38; low vision - 79.32; mobility wheelchair - 79.84; mobility non-wheelchair - 80.85. Canada Post services are offered through three types of outlet: corporate - facilities operated by Canada Post, franchise - operated as small businesses, and retail outlets operated on a commission basis.

The overall accessibility rating by outlet type was: corporate - 78.77; franchise - 81.55; retail 74.52.

Despite almost ten years of government policy, government services still do not meet national accessibility standards. Banks, subject to the accessibility provisions of the Canadian Human Rights Act since 1983, were generally on par with government departments. Anyone who observes their daily activities with a view to accessibility concerns will see that human rights legislation and government policy have not created an integrated or accessible society.

ii. Why is Change So Slow?

Ten years elapsed from the date of the Obstacles report before a national policy was articulated by the federal government. Why has progress been so slow?

Implementation of the integration model is a major change in the way society interacts with disabled people. This is inevitably a slow process. A multi-disciplinary and multi-policy approach is required. The stick of human rights complaints, Charter challenges, withholding of funding, etc. needs to be combined with the carrot of tax benefits, public funding, and the presence of disabled people interacting with non-disabled people in daily life. Despite the inevitability of slow progress, it is exacerbated by the lack of public policy direction, the continuing influence of negative attitudes about disabled people, and institutional inertia.

The implementation of policy decisions does not occur automatically. Even after the relevant governing authorities have decided to implement a new or modified policy, pockets of resistance and ignorance remain. One aspect of policy implementation is the education of those who are unaware of the policy and its implication. Another is the effort to overcome the resistance of those who do not want to have the policy implemented. Stephen Percy, in his book dealing with the implementation of the policy
shift reflected in section 504 of the U.S. Rehabilitation Act, 1971\textsuperscript{62} notes that little work has been done on developing a comprehensive analytical framework for the study of the processes by which policy directions are operationalized.\textsuperscript{63} He attempts to fill this lacuna by proposing an organizing framework "that is based upon the notion of institutional analysis, namely that implementation policies are set and reset as relevant actors interact within institutional arenas so as to protect their positions."\textsuperscript{64} The implementation of public policy, expressed as legislation or otherwise, involves considerations of the political and administrative processes of policy refinement (what does it really mean?), policy diffusion (informing the relevant parties about the policy), and policy execution (daily administration).

Before public policy changes can occur the issue must appear on the action agenda. Policy implementation is not a linear process: instead, the issues frequently bounce around various institutional arenas. The people involved in policy implementation act to further their own interests. A great melange of broad based environmental trends, long and short term interests of the actors, and the relative power of the various arenas themselves all combine to explain the dynamic process involved in the implementation of any particular policy.\textsuperscript{65}

The environment in which public policy options are supported, rejected, or ignored changes. The political environment may change by the result of a single election: a different political party may bring a change in the basic ideology of government. The

\textsuperscript{62} Stephen L. Percy, Disability, Civil Rights, and Public Policy: The Politics of Implementation. The discussion which follows is based on this book.

\textsuperscript{63} See also Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law, p. 37 where he also notes the lack of theoretical work on this subject. This study is based on the implementation of the Lanterman-Petris-Short Act, 1967, which was in essence a program to deinstitutionalize the provision of mental health services in California.

\textsuperscript{64} Supra, fn. 61, p. xi.

\textsuperscript{65} See also Bardach, supra, fn. 63, p. 9, where he describes the implementation process "as a process of strategic interaction among numerous special interests all pursuing their own goals, which might or might not be compatible with the goals of the policy mandate."
practical actions of a government will be affected by the ideological basis of the party. However, whatever the ideology of the governing party, a government is influenced also by the economic environment within which it must function. A conservative government which has no money will pursue different policies than a social democratic government with no money. As well, these two governments will pursue different policies if they have money. Public attitudes and expectations change over time and reflect the general economic health of a country, its changing demographics, and a host of other factors. All of these environmental factors impact on the selection of policy options.

The people involved in policy development include the legislators and their staff and advisors, the beneficiaries of the policy (eg. the consumers of services for disabled people), those who work in the regulated sector, and the bureaucrats who must implement the policy which is chosen. Not all actors are equal. Some actors operate in arenas which have more power. Some actors are essentially bit players who arrive on the scene to vote at the right time. Some are strongly motivated by a desire to obtain the benefit of a proposed policy or by a desire to avoid the consequences of the policy. In addition, the power to influence is affected by the formal and informal lines of communications an actor maintains with other actors. Percy refers to these links as "issues networks".

The institutional arenas in which policy options are debated include legislatures and local government councils, cabinets, legislative committees (including budget, coordination, and specific subject matter committees), the courts, line departments and administrative agencies, and local constituency offices. In addition to those public arenas, corporate board rooms, community group board rooms, and large public conferences are important arenas where positions are developed to argue for or against public policy initiatives.

In summary, Percy argues that the implementation of public policy is a dynamic process involving many institutional arenas and institutional actors.

The study of the implementation of any public policy initiative may be considered
from four interrelated perspectives: 1) implementation as political process, 2) implementation as administrative process, 3) implementation as intergovernmental relations, and 4) implementation as a game between rational actors.

Implementation as Political Process: Implementation of public policy involves ongoing political struggles to influence the direction of policy implementation and the allocation of resources. Interest groups continue to lobby for their interests after legislation is passed - either to effectively expand the effect of the policy or confine its scope by influencing the implementing regulations, policy directives, and funding programs. At each political decision level the scope of discretion allows political input to expand or reduce the effect of the policy. In essence, the same politics continue in different forums. These may include pressures on the administrative agencies to give a broad or narrow interpretation to their mandate, arguments made to the courts, and arguments raised in response to publication and calls for comments on proposed regulations. Whenever there is a discretionary power there is room for political pressure to exercise that discretion in preferred ways.66

Implementation as Administrative Process: This approach attempts to explain implementation in terms of traditional questions of administration, including tensions between centralization and decentralization, the structure of authority relationships, problems of communication and information flow, and the divergent expectations, skills, interests, and commitments of administrative personnel.67

One important set of administrative variables, considered in some fashion in most

66. Bardach, *ibid*, agrees with the notion of implementation as political process, but observes that:
   It is a form of politics in which the very existence of an already defined policy mandate, legally and
   legitimately authorized in some prior political process, affects the strategy and tactics of the struggle. The dominant effect is to make the politics of the implementation process highly defensive. A great deal of energy goes into manoeuving to avoid responsibility, scrutiny, and blame. (p. 37)
   Unlike the political process to achieve the adoption of the policy, which seeks to form coalitions of interest groups, the politics of implementation are characterized by coalition breakdown as each part tries to defend its particular interests. "All might approve of the new program in principle, but all would want to alter the terms of its implementation just slightly to assuage their own particular fears." (p. 42)

implementation studies, concerns the qualities of public officials, in particular, their skills, interest, commitment, and experiences. It is evident from empirical work that lack of commitment to policy objectives can impede effective implementation efforts, as can insufficient technical and political skills... The importance of staff to implementation suggests that administrative processes of personnel recruitment, task assignment, and evaluation have many potentially important linkages to the outcome of implementation programs.68

Although the internal processes of a bureaucracy have a significant impact on policy implementation, Bardach observes that this approach, in his terms "implementation as an administrative control process", is limited because implementation involves many more actors than the bureaucrats.69

Implementation as Intergovernmental Relations: Implementation of nationwide policies requires continuous interaction among federal, provincial, and local governments. Jurisdiction conflicts involve ongoing questions about which level of government has to pay what share and which level has the authority to decide the effective direction of the benefit program. Delegation of power from a higher level of government may occur through a direct delegation of power or indirectly through controls on funding. Energy which should go to implementing the policy frequently goes to arguing about levels of authority, monitoring powers, and accountability. These problems are exacerbated when the end result of a policy direction is not clear and obvious.

Implementation as a Game between Rational Actors: Every policy has to be implemented by many hundreds of government and industry officials. This perspective looks at the players, what they see as important, what they want, how they interact, and how they manipulate the process to get what they want. These actors are seen as rational, in the sense that they act to achieve a personal objective they find satisfying. These objectives may involve achieving influence, power, satisfaction in a job well done, implementation of their values, or the joy of the battle, to mention but a few possibilities.

Achieving the psychological objective is manifested by achieving the outcome they are seeking.

While it may be true that playing a "game" may be rational in the sense that the actor is pursuing an objective he/she wants to achieve, these games frequently are destructive to the process of implementing the objectives of the policy. Bardach describes these destructive effects in general terms as:

(1) the diversion of resources, especially money, which ought properly to be used to obtain, or to create, certain program elements, (2) the deflection of policy goals stipulated in the original mandate, (3) resistance to explicit, and usually institutionalized, efforts to control behaviour administratively, and (4) the dissipation of personal and political energies in game-playing that might otherwise be channelled into constructive programmatic action.

The outcome of any argument can be different in different arenas because each arena has its own rules. Thus, individuals have an incentive to try the same arguments in different arenas. This has the benefit of reducing frustration levels for the losers since they have an outlet that might reasonably accede to their argument but the disadvantage that it also encourages endless repetition and slows down the progress of implementing the new policy.

Bardach observes that even if a policy direction is adopted it may still not be possible to implement it as designed or to implement it in a way which achieves its objective. He notes that even when the design of the policy takes account of the vicissitudes of implementation the process is "inherently unpredictable". His study demonstrated the ongoing process of implementation:

Even the most robust policy, one that is well designed to survive the implementation process, will tend to go awry. The classic symptoms of underperformance, delay, and escalating costs are bound to appear. As they do, someone or some group must be willing and able to set the policy back on course.

These theoretical constructs can usefully inform study of the implementation of

70. Ibid, p. 66.
71. Ibid, p. 5.
disability policy in Canada. The federal government has less direct authority to influence provincially regulated matters than in the U.S. Legislated federal-provincial funding agreements require inter-government agreement on policy directions and rates of implementation. The federal government also can impose criteria on projects it funds directly even if legislative authority rests with provincial governments. However, the constitutional debate puts constraints on any government, but particularly the federal government, appearing to assert jurisdiction in new areas. Finally, the various governments are influenced to different degrees by the different political philosophies of the various interest groups which pressure governments to pursue their interests. This means that the various governments often disagree on how to implement policies that superficially appear identical. The administrative process and nature of the actors are similar in both countries.

As an example, to better reflect on the accuracy of these theoretical constructs, I will very briefly describe what happened when Parliament adopted a policy decision to promote accessibility rights by the use of voluntary adaptation plans.

By mid-1982 the Canadian Human Rights Commission was aware that amendments to the Canadian Human Rights Act to introduce the concept of adaptation planning would be enacted. This concept permitted covered entities to devise and submit plans for adapting their facilities to make them fully accessible to disabled people. Once a plan was approved by the Commission no complaint could be filed in relation to any matter covered by the plan. These amendments came into effect July 1983.72

72. S. 17. (1) A person who proposes to implement a plan for adapting any services, facilities, premises, equipment or operations to meet the needs of persons arising from a disability may apply to the Canadian Human Rights Commission for approval of the plan.
(2) The Commission may, by written notice to a person making an application pursuant to subsection (1), approve the plan if the Commission is satisfied that the plan is appropriate for meeting the needs of persons arising from a disability.
(3) Where any services, facilities, premises, equipment or operations are adapted in accordance with a plan approved under subsection (2), matters for which the plan provides do not constitute any basis for a complaint under Part III regarding discrimination based on any disability in respect of which the plan was approved.
(4) When the Commission decides not to grant an application made pursuant to subsection (1), it shall send a written notice of its decision to the applicant setting out the reasons for its decision.
Between November 1982 and October 1984 a consultant was engaged to advise the Commission on how to implement adaptation planning and a series of consultation meetings were held with representatives of various interested parties.

In mid-1983 the consultant recommended the Commission proceed on the basis that respondents would want to submit voluntary plans and that the Commission itself would advocate the benefits of such plans, provide expert advice to respondents, and have the technical capacity to minutely critique submitted plans. The underlying theory was that the adaptation planning concept would be a positive way to systematically achieve full accessibility.

As the consultation meetings continued, the Commission formed the opinion that the respondent and disabled communities wanted the Commission to perform the role of expert on accessibility and barrier free design and avoid assuming that responsibility themselves. Even at that time concerns were being raised about the resources this approach would require and that the Commission could not meet. A combination of philosophical, legal, resource, and practical concerns, as well as the recognition that numerous private and public entities were becoming expert on the subject, lead the Commission to seek an alternative approach.

Eighteen months later the Commission sought further advice. In June 1985 it

S. 18. (1) If the Canadian Human Rights Commission is satisfied that, by reason of any change in circumstances, a plan approved under subsection 17(2) has ceased to be appropriate for meeting the needs of persons arising from a disability, the Commission may, by written notice to the person who proposes to carry out or maintains the adaptation contemplated by the plan or any part thereof, rescind its approval of the plan to the extent required by the change in circumstances.
(2) To the extent to which approval of a plan is rescinded under subsection (1), subsection 17(3) does not apply to the plan if the discriminatory practice to which the complaint relates is subsequent to the rescission of the approval.
(3) Where the Commission rescinds approval of a plan pursuant to subsection (1), it shall include in the notice referred to therein a statement of its reasons therefor.

S. 19. (1) Before making its decision on an application or rescinding approval of a plan pursuant to section 17 or 18, the Canadian Human Rights Commission shall afford each person directly concerned with the matter an opportunity to make representations with respect thereto.
(2) For the purposes of sections 17 and 18, a plan shall not, by reason only that it does not conform to any standards prescribed pursuant to section 24, be deemed to be inappropriate for meeting the needs of persons arising from disability. S.C. 1980-81-83-83, c. 143, s. 9: Now R.S.C. 1985, c. H-6.
embraced a new conception of adaptation planning. This approach saw adaptation planning as an undesirable exception to the basic principle of non-discrimination promulgated by the *Act*. As a consequence, voluntary adoption of such plans would not be vigorously advocated, the responsibility to obtain technical expertise would rest with the applicant, and the Commission would assess submitted plans only against broad based human rights principles. It would be up to the applicant to prove that the high threshold standards for approval had been met.

It is to be noted that even then there was not a full consensus among the various branches of the Commission on the proper approach or the exact legal duties of the Commission in relation to adaptation planning.

In the meantime, many other government and private agencies were involved in work on access rights. For example, Transport Canada was a major initiator of efforts to deal with issues related to the transportation of disabled people and had numerous consultative committees working. With the passage of the amendments that department acted on the basis that the adaptation planning concept was to be an integral part of this process. One important committee was the Council of Transport Ministers Responsible for Transportation and Highway Safety. This Council adopted a set of principles to guide bus accessibility in 1985. At the same time it decided to encourage bus companies to file adaptation plans with the Commission. Five large companies did so in mid-1985, relying on the principles adopted by the Council. Although the Commission had not finalized its internal debate on how it would implement the amendments, it was clear from a quick review that the plans did not even begin to address the issues of access for disabled consumers. They basically dealt with architectural changes to the terminals and forgot all about the buses themselves.

In June 1985 the Commission adopted the alternative policy approach. The underlying philosophy was that adaptation plans were an exception to the principles of non-discrimination and individual redress established in the *Act*. Plans should only be
presented where they dealt with unusual situations where the applicant could demonstrate good cause for requesting an exemption to the Act. In June 1986 the Commission approved the administrative procedures for reviewing adaptation plans. The five bus companies were given a copy of the policy and procedures in response to their submitted plans. The Commission never heard from them again!

In November 1985 the Commission issued a special supplement to its then regular newsletter to advise the country of its policy and procedures for adaptation planning. In October 1986 the Commission published a booklet setting out the principles and procedures for adaptation planning in which it said that the only reason why a respondent would spend the time and money needed to obtain approval for a plan was to avoid a complaint of discrimination. Since the number of complaints at provincial and federal levels had been, and remains minuscule, it is no wonder respondents have removed adaptation planning from their agendas! The disability community groups were fully involved with various other initiatives and never showed a great deal of enthusiasm for adaptation planning. By June 1986 no one at the Commission was specifically assigned to adaptation planning and since then it has disappeared from the Commission’s agenda as well.

I assume that when Parliament approved the adaptation planning amendments it intended to implement adaptation planning as part of the broader public policy shift in relation to disabled people. At the end of ten years there is nothing left of this policy initiative. From this brief example we can see each of Percy’s four perspectives. The various interest groups had different objectives in responding to the initiative and no consensus was ever reached. The political processes moved from Parliament to the arenas of the government committees and, to a lesser extent, public consultation forums. At the administrative level the search for a common understanding of what the Commission

73. Adaptation Planning.
really wanted to do with the initiative took some three years. The outcome of this search, that adaptation plans were seen as exceptions to be strictly limited, was that the initiative had no value for the respondent community so it had no reason to volunteer itself. In terms of inter- and intra-governmental relations extensive consultations between federal government departments, federal and provincial governments, and governments and industry were ongoing. If Parliament had intended that adaptation planning be integrated into this ongoing work I think it was an error to place the responsibility with an agency which was otherwise primarily engaged in complaint prosecution. Adaptation planning’s voluntary nature, which needed the incentives of grants and tax benefits, was consistent with the ongoing consultations approach but not with the non-discrimination, complaint investigation principles of the Commission. In practical reality, improvements in accessibility are being achieved more through the political pressure/consultation process than through human rights legislation. The rational actors had different objectives when they considered adaptation planning. It is somewhat ironic to consider that, within Percy’s concept of implementation as a game, for some people the failure to implement this policy initiative was the objective. I think it would be safe to argue that everyone subject to this initiative is satisfied with the current situation except maybe Parliament, if it ever decided to ask why its policy directive had come to naught!

My discussion of adaptation planning was premised on the assumption that everyone involved held ‘appropriate’ attitudes toward the issue of access and the events which occurred are explainable as normal events in the process of implementing any public policy change. Negative attitudes held by decision makers also cause delay. If the decision makers have limited understanding of the issues and privately harbour doubts about the whole exercise, accessibility issues will be placed low on the list of daily priorities. And, when they do consider the issues, they are constrained by the ghosts of discredited attitudes, which are present subconsciously or are simply unstated.

The transition to an integrated society is difficult institutionally and personally.
Society must be willing to spend more now to save more later. In the beginning an inclusiveness policy will result in little change in daily experience. There is a need for a 'critical mass' of disabled people in the community to draw out others and promote acceptance by non-disabled people. Once a certain level of integration is achieved people will start to get out and be included when they see others included. The fear of integration exists among disabled people as well as non-disabled people.

In the face of limited budgets, institutions must make decisions about the priority to be given to all the separate actions that are required. Most often institutions do not consult with the disabled consumers who will use the facilities. Individuals and groups that file complaints with the human rights commissions to deal with particular barriers are often able to re-arrange particular priorities because of the complaints. However, the human rights enforcement system is unsuitable as a tool for the planned, coordinated, and integrated implementation of programs.

Decision making without the input of the potential consumers of the services, the pressures of other priorities, and hesitations and private reservations about the ideal of integration as a principle make the implementation and enforcement systems currently in place substantially ineffective.

C. Political Advocacy:

As the consumers of the services, disabled people began to claim the right to control what services they would accept and how they would be delivered. The disabled person was no longer to be a grateful recipient of a gift but a consumer of services entitled to decide what to consume. The professional was to give advice and guidance, not dictate the nature of the service.74 Disabled people formed groups which agitated for both

74. Obstacles, p. 109.
change and action. These groups were political in the sense that they wanted to influence public policy towards disabled people. Their objective of achieving consumer control of services led to political action since they could not wrest control from the established power system without political action.

Consumer control of the first interest groups was the exception.75 The 1970s saw marked changes for disabled people with the rise of the self-help consumer movement, trends towards integration of special education, and rapid advances in medical and health care services and technological aids. The goals of 'mainstreaming' and 'integration' were rapidly gaining favour. Moving beyond claiming control of services delivered directly to disabled people, the disabled consumer movement claimed the right to be included in society. At a time in which the concept of rights dominated political discourse, to demand that disabled people be specifically included found favour.

Generally, consumer groups are based on three main principles: 1) disabled people have to be a majority of the Board of Directors and over 50% of the membership, 2) the group is to be primarily involved in advocacy, supporting efforts of the entire disabled population and acting as a unified voice, and 3) the group is not primarily involved in direct services.76

A major milestone occurred at the 1973 Conference of the Canadian Rehabilitation Council for the Disabled where disabled participants voted unanimously to represent themselves rather than allow the CRCD to represent them.

Many consumer groups arose in the mid-1970s: for example, the Manitoba League of the Physically Handicapped (1973), the Saskatchewan Voice of the Handicapped (1974), the British Columbia Coalition of the Disabled (1975), the Blind

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75. Disabled Persons in Canada, supra, fn. 33; One example was the Associated Blind, a cooperative of blind people in Toronto formed in 1890.

76. April D'Aubin, Can't Get No Satisfaction, p. 91: The fundamental principles of the consumer movement are self-determination, integration, equality, full participation, independent living, and consumer control.
Organizations of Ontario with Self-Help Tactics (1975), and the Nova Scotia Disabled Individuals Alliance (1977). A national body, the Coalition of Provincial Organizations of the Handicapped (COPOH), began informally in 1975, and incorporated in 1978.\(^7\)

At the 1980 Parameters of Rehabilitation Forum COPOH delegates agreed that rehabilitation stopped after the person reached maximum physical capacity and then independent living began. They did not want to remain 'sick patients' for doctors and 'caseloads' for social workers. Around this time the World Assembly of Rehabilitation International, an international organization of social workers and rehabilitation professionals concerned with disabled people, had rejected a request that disabled people be granted equal representation in the Assembly. At the 1980 World Congress of Rehabilitation International, held in Winnipeg, the COPOH delegates to the Congress began strategy sessions three days before the Congress on how they would press their interests at the Congress and beyond. From the discussions among disabled people at this Congress the World Coalition of Disabled Persons was established to organize an international meeting of disabled people in Singapore in 1981. At Singapore the group was renamed Disabled Peoples International. It is an organization of disabled people who represent the interests of disabled people.\(^8\)

While the type of consumer group described above was less interested in direct services than political action to achieve a change in the disability paradigm, other people were establishing Independent Living Centres. These Centres were, and are, designed to be central resource information centres so that disabled people can find the support they need to live in the community. They are firmly based on a maximum integration public policy, and, as such, are promoting a political agenda on the practical level.

77. Disabled Persons in Canada. supra, fn. 33. COPOH changed its name to the Council of Canadians with Disabilities in 1993. In the United States the consumer movement, referred to as the 'independent-living movement', also arose in the early 1970's. The earliest centres were in Berkeley, Calif., and Boston, Mass.; see Gerben DeJong and Raymond Lifchez, Physical Disability and Public Policy, Scientific American V. 248, #6, June 1983, p. 40.

Independent living is freedom of choice to live where and how one chooses and can afford. It is living within the community in the neighbourhood one chooses. It is living alone or with a room mate of one's choice. It is deciding one's own pattern of life - schedule, food, entertainment, vices, virtues, leisure, and friends. It is freedom to take risks and freedom to make mistakes.79

The independent living program is based on client choice, not choices imposed by disability professionals. The programs are run by disabled people as consumers of the services. The program is based on three principles;

1. Those who know best the needs of disabled people and how to meet those needs are disabled themselves.
2. The needs of the disabled can be met most effectively through comprehensive programs which provide a variety of services.
3. Disabled people should be integrated as fully as possible into their community.80

The model can encompass consumer control by those who, because of the nature of their disability or personal preference, remain living in an institution.

Only disabled people have the interest to compel the implementation of a policy of integration. One must not expect non-disabled people to do it from charity or even because it is the law. However, disabled people and non-disabled people have a right to a say - participation and involvement of all members of the community must be primary implementing principles. Even recognizing the usual problems of group leadership and accountability to the great number of people who don’t take part in the process, disabled consumer groups are the primary spokespersons for disabled people. Persistent advocacy to press institutions on various fronts is the only way to achieve results.

Having discussed the nature of the disability community, the various notions of equality, and official policy, in the next two chapters I review the primary rights enforcement mechanisms - first, human rights legislation, and then the Charter of Rights and Freedoms. While these are primarily descriptive chapters my purpose is to try to

identify their strengths and weaknesses as tools to advance the interests of disabled people. It is because of their potentially limited effectiveness that I will be proposing in the last chapter alternatives which may more effectively bring about equality in the long run.
V. HUMAN RIGHTS LEGISLATION:

All human rights legislation in Canada prohibits discrimination against mentally and physically disabled people in employment, residential accommodation, and the provision of goods, services, and facilities customarily available to the public (for ease of reading these will be collectively referred to as "services", except where the context requires otherwise). Since human rights legislation has achieved a quasi-constitutional status in Canada its power to advance the interests of disabled people should not be underrated. However, there are qualifications in the legislation and problems with its administration which limit its effectiveness especially in dealing with accessibility rights.

The objective of this chapter is to review human rights legislation in relation to the provision of services to disabled people. The extent of this protection will be considered by reviewing the definitions of discrimination, disability, and services and the exceptions to the general non-discrimination rule. Since there is little jurisprudence dealing with this subject (in contrast to issues relating to the employment of disabled people) the probable interpretation of the legislation will be considered by looking at the interpretation of the legislative provisions prohibiting discrimination against disabled people in employment and administrative interpretation as enunciated in the policies of two human rights commissions. I will briefly review the remedies available through the human rights process. Finally, I will discuss some of the practical weaknesses in the system.

Although this chapter is primarily descriptive, a good knowledge of human rights

law is necessary to assess the potential of the legislation to advance the interests of disabled people. There are a number of essential weaknesses in the entire approach to human rights which these laws embody. In the last chapter I will be proposing changes to the basic approach to enforcing accessibility rights. In order to assess whether my suggestions have any merit, an appreciation of the legislation is required.

A. General Principles of Interpretation:

The Supreme Court of Canada has consistently held that human rights legislation is to be interpreted broadly and liberally so that it may be effective in dealing with the mischief it is designed to counteract. As a corollary, legislated defences are to be construed narrowly.

The courts have elevated human rights legislation to a quasi-constitutional status even in those provinces which do not explicitly give the legislation paramountcy over all other legislation. In *Insurance Corp. of British Columbia v. Heerspink* Mr. Justice Lamer (as he then was) wrote:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the *Code* or in some other enactment, it is intended that the *Code* supersede all other laws when conflict arises.

... [T]he *Human Rights Code*, when in conflict with "particular and specific legislation", is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.²

Mr. Justice McIntyre, *per curiam*, said in *Winnipeg School Division No. 1 v. Crator*:

> Human rights legislation is of a special nature and declares public policy regarding

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matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. ...  

In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* McIntyre J., *per curiam*, said that human rights legislation "is of a special nature, not quite constitutional but certainly more than the ordinary. ...".  

In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (Action Travail des Femmes)* the Court again rejected a limiting technical interpretation of human rights legislation. Chief Justice Dickson, in the context of considering the remedial powers of a federal human rights Tribunal, said:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.  

Just as the remedial nature of human rights legislation requires a broad and liberal reading the statutory defences must be read narrowly. In *Ontario Human Rights Commission v. Borough of Etobicoke* McIntyre J. stated that under the *Ontario Human Rights Code* "non-discrimination is the rule of general application and discrimination, where permitted, is the exception." Mr. Justice Beetz, in *Commission des droits de la personne du Québec v. Town of Brossard*, said "*bona fide* occupational qualification exceptions in human rights legislation should, in principle, be interpreted restrictively since

they take away rights which otherwise benefit from a liberal interpretation."7

The interpretation of human rights legislation is to be based on a "purposive approach". As in Charter cases, this approach requires a search for the purpose of the legislation and an interpretation which furthers that purpose. Although, as has been seen, the Supreme Court has held that such legislation embodies fundamental values, it was in Zurich Insurance Co. v. Ontario (Human Rights Commission) that the Court clearly identified its understanding of the purpose of human rights legislation. Mr. Justice Sopinka said: "The underlying philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics."8 Madame Justice L’Heureux-Dubé, dissenting, said:

The starting point for any analysis of human rights legislation is the recognition that the purpose of such legislation is the protection of fundamental individual rights. These rights are violated if stereotypical group characteristics are ascribed to individuals. Since the protection of human rights is vitally important in our society, legislation prohibiting discrimination must be construed broadly using a purposive approach.9

Zurich Insurance dealt with a complaint that automobile insurance rates based on membership in classes described by age, sex, and marital status were discriminatory. In that case an emphasis on the individual was adequate to set the stage for the later analysis. However, in other contexts, the purpose of human rights legislation must be seen to transcend individual concerns. If one identifies the purpose of the legislation as being the elimination of disadvantage due to discrimination experienced by individuals because of their group membership then individual differentiation becomes only one part of a more complex analysis. It is curious that the result in Zurich Insurance, that different insurance rates based on group characteristics were permitted by the legislation in question, was a


8. Supra, fn. 5 at p. 373.

9. Ibid, at p. 351-2. Both majority and minority judgements in Dickason, supra, fn. 5, reaffirm these principles.
decision based on group characteristics and not individual merit. Employment equity programs, for example, must balance individual and group interests in order to achieve their objective of ending disadvantage caused by discrimination. If a complaint of discrimination by a white man excluded from a job because of such a program is analyzed only in an individual context one will get a different outcome than if the complaint is analyzed in a group context.

A broad and liberal interpretation of the rights protected by the legislation linked to a narrow interpretation of the defences available maximizes the effectiveness of the legislation. The purposive approach will ensure the wide range of interests represented by the rubric "accessibility rights" are protected. However, in practice the defences are not as narrowly construed as the rhetoric would have us believe. The primary defence to employment discrimination because of disability, the *bona fide* occupational requirement defence, has been interpreted more generously than necessary. There is also a significant difference between the decisions of human rights commissions and boards of inquiry and decisions of the courts in the scope of the statutory defences.

It should also be noted that affirmative action, usually called "special programs" in the legislation, are defences to complaints of discrimination. A narrow interpretation of defences would mean that a high standard should be set to meet the special program defence. In fact the standard is minimal and human rights commissions want to give employers as wide a latitude in undertaking special employment programs as possible.

10. The Court emphasized the special nature of the insurance business which is based on statistical probability and risk sharing. Despite the Court's opinion that there were no reasonable alternative schemes which could achieve the objective, this decision did not have to be reached. There are provinces which have abolished the age, sex, marital status rate differences and still manage to run government insurance. It is a question only of what factors will be used to assess risk and the choice of sex, etc., is not inevitable. In *Co-Operators General Insurance Co. v. Alberta (Human Rights Commission)*, November, 1993, unreported, rev'd (1991) 14 C.H.R.R. D.43, the Alberta Court of Appeal applied the *Zurich Insurance* reasoning in the context of s. 11.1 of the *Alberta Individual Rights' Protection Act* to find different rates based on sex to be "reasonable and justified".
B. Definition of Discrimination:

i. Judicial Definitions:

Judicial consideration of the definition of discrimination is discussed before legislative definitions because several provinces amended their legislation in response to various judicial decisions. Everyone discriminates in the sense of identifying differences and making decisions based on those differences. The courts have held that discrimination may occur by treating people differently or identically. Therefore, a definition of discrimination is required to determine whether a particular circumstance is a manifestation of illegal discrimination.

Early human rights boards of inquiry required proof of intent to treat a person adversely on the ground in question before liability was imposed. It was necessary to prove the respondent's action was based on dislike for, or prejudice against, the individual because of the prohibited ground. Liability will still attach upon proof of such intent. However, since it is almost impossible to prove this type of intention, this requirement was soon abandoned and the concept of discrimination by differential treatment was recognized. Upon showing that the complainant was treated differently from others and in the absence of a legitimate non-discriminatory explanation it is assumed that the difference in treatment is because of, or based on, the prohibited ground of discrimination. In the mid-1970's, boards of inquiry adopted the notion that discriminatory consequences regardless of knowledge or intent, the adverse effect (or indirect) model of discrimination,

would attract liability.\textsuperscript{12}

However, the applicability of the indirect discrimination concept was cast in doubt in Canada by two courts in the early 1980s. An essential aspect of indirect discrimination is that the respondent not intend to discriminate. However, the Ontario Court of Appeal in \textit{Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.}\textsuperscript{13} and the Federal Court of Appeal in \textit{Bhinder and the Canadian Human Rights Commission v. Canadian National Railways Company}\textsuperscript{14} held that intent was necessary for a finding of discrimination under the applicable human rights laws.

Both cases were appealed and the Supreme Court of Canada confirmed the applicability of the adverse effect concept of discrimination to Canadian law. \textit{O'Malley} dealt with a woman who was forced to accept part time work since her employer would not accommodate her religious need to not work on Saturdays. McIntyre J., \textit{per curiam},


\textbf{13} (1982), 138 D.L.R. (3d) 133, aff'g (1982), 133 D.L.R. (3d) 611 (Ont. Divisional Court), rev'g (1982) 2 C.H.R.R. D/267. Southey J., for the majority in the Divisional Court said, at p. 618, Although the language of s. 4(1)(g) (of the \textit{Ontario Human Rights Code}) is logically susceptible of the interpretation given to it by the learned chairman, the construction of the words in their ordinary and natural meaning, in my judgement, results in an interpretation in which the intention to discriminate on a prohibited ground is essential to a contravention.

Lacourciere J., for the Court of Appeal, said, at p. 134, The offense created by the Code, proscribing discrimination "because of" race, creed, colour, etc., clearly refers to the employer's motivation... An intention to discriminate on a prohibited ground is essential to a contravention.


In my opinion section 7 only contemplates direct discrimination - that is, discrimination in which there is a discriminatory intention or motivation or differential treatment on a prohibited ground with or without intention. It does not extend to discrimination in which there is neither a discriminatory intention or motivation nor differential treatment.

He went on, for himself only, to say at p. 557, "Section 10, on the other hand, would appear to be sufficiently comprehensive to include the effect of indirect (adverse effect) discrimination." However, Heald J., for the majority, said at p. 534: "I do not, however, agree with Mr. Justice LeDain's view that section 10 of the Canadian Human Rights Act is sufficiently comprehensive to include the effect of indirect discrimination."
stated:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.¹⁵

He went on to discuss the difference between direct and indirect discrimination, saying:

Direct discrimination occurs . . . where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. . . . On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. . . . An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.¹⁶

These two cases, which confirmed the applicability of the adverse effect, or indirect, concept of discrimination, involved employment. However, the same concept is applicable to discrimination in the provision of services, as the following examples illustrate. In each case the complainant was required to abide by a policy which was applicable to everyone but which imposed a burden on the person not placed on others, or which disadvantaged the person in a way not experienced by others, because of disability.

_Huck v. Canadian Odeon Theatres Limited_ dealt with an allegation by a person who used an electric wheelchair that he had been discriminated against when he was

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16. _Ibid_, at p. D/3106. The Court’s judgement in _Bhinder v. CN Rail_ [1985] 2 S.C.R. 561, 7 C.H.R.R. D/3093 was released simultaneously. In this case a baptised Sikh had to quit his job after his employer would not accommodate his need to wear a turban in a work area requiring hard hats. McIntyre J., for the court on this matter only, said, at S.C.R. p. 586:

_I adopt the reasoning expressed in _O’Malley_ and conclude that the definitions of discriminatory practices in the _Canadian Human Rights Act_, ss. 7 and 10, extend to both unintentional and adverse effect discrimination._
required to transfer to a regular seat or place his chair in front of the front row of seats. The complainant was unable to transfer because of his disability. He objected that being required to place his wheelchair in front of the front row made for uncomfortable viewing and meant that he could not sit beside his companions. Mr. Justice Vancise said:

The treatment of a person differently from others may or may not amount to discrimination just as treating people equally is not determinative of the issue. If the effect of the treatment has adverse consequences which are incompatible with the objects of the legislation by restricting or excluding a right of full and equal recognition and exercise of those rights it will be discriminatory. 17

In a case involving a disabled child who wanted to participate in a bowling tournament even though she needed a special ramp to push the ball, Lane J. said the respondent "is offering... a service to the public and in my view an analogy is properly drawn between the terms on which such service is offered and the terms on which employment is offered." 18 In dismissing the appeal by the Youth Bowling Council he adopted the adverse effect theory of discrimination and imposed a duty to accommodate.

In Canadian Paraplegic Association v. Canada (Elections Canada) (No. 2) several individuals had complained that they had been discriminated against by the failure of Elections Canada to ensure polling stations were wheelchair accessible in the 1984 election. The argument was based on the principle of indirect, or adverse effect, discrimination. The Tribunal held that:

... the difference in treatment resulting from the absence of level access comprised an adverse differentiation... I find that in each such instance, the embarrassment caused, the risk of injury caused or the inconvenience caused, resulted in a significant negative effect which, considering the importance of the right to vote, and the objects of the Human Rights Act, comprised a breach of section 5(b) of the Statute. 19


In *Woolverton et al. v. B.C. Transit operating "HandyDART"* the respondent's rules for scooter use on the special HandyDART vans used to transport disabled people were challenged. On December 15, 1988, a policy was implemented which required scooter users to dismount and transfer to a regular seat. On July 1, 1989 this was modified for a transitional period to allow scooter users to remain in their scooters but requiring them to sign a waiver of liability if they did so. Referring to the distinction between direct and adverse effect discrimination the Council Member Designate stated: "While this distinction was developed in the context of employment situations, I can see no reason why it should not be equally applicable to situations involving the provision of services to the public." She determined that, while there was no direct discrimination, the policy amounted to adverse effect discrimination because it "imposed on the Complainants restrictive conditions and obligations not imposed on other members of the public provided service by the Respondent." In rejecting the respondent's argument that it discriminated against the mobility aid not the disability, the Member Designate said: "There is, however, a clear and cogent nexus between the Complainants' physical disabilities and their choice of scooters." It was no answer that the complainants may have been able to use wheelchairs (which was not true for all the complainants).

Discrimination is a comparative concept. An initial step in analyzing a claim of discrimination is to identify appropriate comparison groups. For example, in *Battlefords and Dist. Co-operative Ltd. v. Gibbs* the employer's disability insurance policy allowed physically disabled employees to receive benefits until age 65 but mentally disabled employees only received benefits for two years. The employer argued that the comparison should be made between "disabled" and "non-disabled" employees. Lawton J. said:

To determine if there has been discriminatory treatment or a denial of equality, one has to make comparisons and to make necessary and correct comparisons one has to establish a basis upon which to make them. . . . [T]he standard approach has become the comparison of the situation of someone of one colour or sex to the situation of people of another colour or sex. It is "colour" to "colour" or "sex" to "sex".

. . . The standard approach, with its comparison of "sex" to "sex" or "colour" to "colour" dictates comparing "disabled" to "disabled." 24

The definition of discrimination developed by the courts includes actions which directly or indirectly impose burdens on, or withhold benefits from, individuals because of a prohibited ground of discrimination. The definition is sufficiently broad to include any situation in which the effect of the treatment of the individual has negative consequences in comparison to the effect of the treatment on others. The qualifying factor in most jurisdictions is that the human rights statute has a limited list of prohibited grounds of discrimination. If the negative effect is due to a factor not on the list the discrimination is not prohibited.

ii. Statutory Definitions:

In most jurisdictions there is no legislated definition of the term "discrimination". For example, the British Columbia Human Rights Act simply describes the prohibited activity by the terms "deny" and "discriminate against" because of a prohibited ground of discrimination. 25

24. (1993) 18 C.H.R.R. D/387 (Sask. Q.B.) at D/391. He found support for this approach in Brooks v. Canada Safeway Ltd [1989] 1 S.C.R. 1219, 10 C.H.R.R. D/6183, in which Chief Justice Dickson held a disability policy which distinguished between all other disabilities and pregnancy related disabilities to be a form of sex discrimination. Lawton J., at D/392, said: "Clearly he is comparing one type of disability with others and finding discrimination." Despite these comments, in most cases the comparison will be between the treatment of a disabled and a non-disabled person.

25. S. 3 (1) No person, without a bona fide and reasonable justification, shall
(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
(b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public, because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons. S.B.C. 1984, c. 22, as amended.
The Canadian Human Rights Act provides a little more guidance by describing discrimination as a denial, or denial of access to, or adverse differentiation in the provision of, a service on a prohibited ground of discrimination.26

The Manitoba and Ontario Human Rights Codes are the only statutes which provide an extensive definition of discrimination. These definitions were devised at least in part as a response to the lower court decisions in O'Malley27 and Bhinder28 which had rejected the concept of adverse effect discrimination.

The Manitoba Human Rights Code defines discrimination as the "differential treatment of an individual or group" based on membership in a group "rather than on the basis of personal merit", differential treatment based on a list of prohibited grounds, or differential treatment because a person associates with an individual member of a class described by the list of prohibited grounds (through work, friendship, marriage, etc.). In addition, it is discrimination to fail to reasonably accommodate the special needs of a member of a class described by the list of prohibited grounds. Finally, the Code specifies that discrimination may occur regardless of the form of the act or omission or intention to discriminate.29


26. S. 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
   (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
   (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. R.S.C. 1985 c. H-6.

27. Supra, fn. 13.


29. S 9(1) In this Code, "discrimination" means
   (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or groups of person, rather than on the basis of personal merit; or
   (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2) [which lists the prohibited grounds of discrimination]; or
   (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
The Ontario *Human Rights Code* states that "every person has a right to equal treatment with respect to services, goods and facilities, without discrimination [because of a list of prohibited grounds]", and, in s. 10(1), defines "equal" to mean "subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination". As in the Manitoba legislation, a prohibition against adverse effect discrimination, discrimination because of association, and a requirement for reasonable accommodation are specifically included.30

The Quebec *Charter of Human Rights and Freedoms* provides:

S. 10 Every person has a right to full and equal recognition and exercise of his human rights and freedoms without distinction, exclusion or preference based on . . . a handicap or the use of any means to palliate a handicap.

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

S. 9(3) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate. C.C.S.M., c. H-175.

30. S. 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination . . .

S. 10(1) "equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;

S. 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
(b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.

S. 12 A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

S. 17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

17(2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.\textsuperscript{31}

The most recent amendments to the Nova Scotia \textit{Human Rights Act} adopt a definition based on the judgement of Mr. Justice McIntyre in \textit{Andrews v. The Law Society of British Columbia}.\textsuperscript{32} Section 4 provides:

For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic referred to [in the list of prohibited grounds found in s. 5] that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.\textsuperscript{33}

I am of the view that discrimination, whether direct or indirect, may also take an active or passive form. It is active when a burden, obligation, or disadvantage is imposed on an individual or class of individuals. It is passive when an opportunity, benefit, or advantage is not made available to all as, for example, with a word of mouth hiring system or locating an activity in a building which is not accessible because of its structure or location. The remedy for active discrimination is to stop applying the practice or policy which imposes the burden, obligation, or disadvantage and for passive it is to implement a practice or policy which augments the availability of the opportunity, benefit, or advantage.

Many of the statutory definitions of discrimination were enacted in response to the lower court decisions which put in question the adverse effect theory of discrimination. Given the very broad definition of discrimination adopted by the Supreme Court of Canada it is arguable that the statutory definitions do not add anything of substance. (Of course, it is always possible for the Court to change its mind.) Discrimination in all of the human rights acts may be defined as an act or omission, intentional or not, which has the

\textsuperscript{31} R.S.Q. 1977, c. C-12, as amended.
\textsuperscript{33} R.S.N.S. 1989, c. 214, as amended.
effect of denying or limiting access to opportunities, benefits, or advantages available to others. It includes providing a benefit in a less advantageous way such as providing the benefit of employment but harassing the person once hired or allowing wheelchair users into the theatre but restricting placement of the chair to the front of the front row. It includes denying a benefit because of physical or other barriers unrelated to personal merit such as providing a bus service but using only inaccessible buses or placing a welfare office in an inaccessible building.

C. Definition of Disability:

The definitions of mental and physical disability used in the various jurisdictions can be grouped into three models.34

The first model, used by Canada and Manitoba, provides a very minimal definition. For example, s. 25 of the Canadian Human Rights Act provides that "disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."35

The second model provides a much more extensive definition. For example, the Ontario definition includes previous and existing handicaps and the belief that a person had or has a handicap. It goes on to describe in a generic way a variety of physical conditions which may have occurred because of "injury, birth defect or illness", and divides mental handicap into mental retardation, learning disability, and mental disorder.36

34. Three jurisdictions, British Columbia, the Yukon, and the Northwest Territories, provide no definition in the legislation.
36. S. 10 (1) . . .
   "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
   (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by
This model is also used in Nova Scotia. Alberta, Saskatchewan, New Brunswick, Prince Edward Island, and Newfoundland use this model with a slight modification. These jurisdictions leave out specific reference to a belief about disability (i.e., perceived disability). Although there is ample jurisprudence from Canadian and British Columbian cases that discrimination because of a perception that the complainant is disabled will attract the protection of the legislation, a recent Saskatchewan case required that a complainant actually be disabled to obtain the protection of the Code.

Alberta, Saskatchewan, and Newfoundland further modify this model by providing a more detailed definition of "mental disorder". For example, the Alberta Act defines mental disorder as a disorder of thought, mood, perception, orientation or memory that impairs judgement, behaviour, recognition of reality, or the ability to meet the ordinary demands of life.

The third model is used in Québec. The Quebec Charter contains no definition of bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,

(b) a condition of mental retardation or impairment,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder,

(e) an injury or disability for which benefits were claimed or received under the Workers' Compensation Act; R.S.O. 1990, c. H-19.


39. S. 38(1)...

(e.1) "mental disability" means

(i) a disorder of thought, mood, perception, orientation or memory that impairs

(A) judgment,

(B) behaviour,

(C) capacity to recognize reality, or

(D) ability to meet the ordinary demands of life,

(ii) a condition of mental retardation or mental impairment, or

(iii) a learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language; R.S.A. 1980, c. I-2, as amended.
"handicap" but adds "or the use of any means to palliate a handicap". However, the Act to Secure the Handicapped in the Exercise of Their Rights limits its coverage to people who are "significantly and permanently" limited in the performance of "normal activities" or who regularly use a palliative aid.

To determine the scope which should be given to the term "disability" one must look to the interests the legislation is intended to protect. Two interests can be identified. First, there is an individual interest in not being rejected because of an irrelevant particular physical or mental characteristic. Second, there is a group interest in ending the historic discrimination against disabled people which has caused the group to be socially and economically marginalized. Human rights legislation does not distinguish these different interests even though protecting them requires different definitions of disability.

The individual interest is protected by a very broad and liberal definition of disability. For this purpose, a disability should be defined as any mental or physical characteristic, real or perceived, which is used by a respondent to deny a benefit or opportunity. But, for the purposes of the group interest in escaping their marginalized position, this definition will be counter-productive since it trivializes the issue and subverts the intent of employment equity plans by allowing minimally disabled employees to be counted.

An example of a definition designed to deal with the group interest is found in the regulations pursuant to the federal Employment Equity Act. The regulations provide:

3 (b) persons with disabilities are considered to be persons who
   (i) have any persistent physical, mental, psychiatric, sensory or learning impairment,

40. R.S.Q. 1977, c. C-12 s. 10, as amended.

41. S. 1...
   (g). "handicapped person," or "the handicapped" in the plural, means a person limited in the performance of normal activities who is suffering, significantly and permanently, from a physical or mental deficiency, or who regularly uses a prosthesis or an orthopaedic device or any other means of palliating his handicap. S.Q. 1978, c. E-20.1, as amended.

(ii) consider themselves to be, or believe that an employer or a potential employer would be likely to consider them to be, disadvantaged in employment by reason of an impairment referred to in subparagraph (i), and

(iii) . . . identify themselves to an employer, or agree to be identified by an employer, as persons with disabilities;\(^{43}\)

The restrictive definition is more appropriate for a program directed at the group interest. A relaxed definition will defeat the purpose of the program since experience has shown, in the employment equity context, that employers will count, for example, people using glasses as disabled. This does not deal with the disadvantage which the Employment Equity Act was designed to ameliorate.

Whether a single term like disability can have two different definitions to protect different interests is doubtful. It may be that human rights legislation should be amended to provide separate definitions for disability, one to deal with the individual circumstance of unfairness and the other to deal with systemic concerns of the group which would be applicable to cases calling for affirmative action remedies to correct problems of marginalization.

The definitions of disability are all sufficiently inclusive that everyone whose accessibility rights may be infringed would attract the protection of the legislation.

**D. Definition of Goods, Services, and Facilities Provided to the Public:**

The statutory description of the services which must be provided without discrimination because of disability varies somewhat among the various jurisdictions. The Canadian Human Rights Act, (s. 5) uses the words "goods, services, facilities or accommodation customarily available to the general public." B.C. (s. 3) uses "accommodation, service or facility customarily available to the public". Alberta (s. 3) uses "accommodation, services or facilities customarily available to the public".

\(^{43}\) SOR/86-847, Canada Gazette, Part II, Vol. 120, No. 18.
Saskatchewan (s. 12) uses "accommodation, services or facilities to which the public is
customarily admitted or which are offered to the public." Manitoba (s. 13) uses "any
service, accommodation, facility, good, right, license, benefit, program, or privilege
available or accessible to the public or to a section of the public". Ontario (s. 1) uses
"services, goods and facilities" without further qualification. Quebec uses (s.12) "goods
or services ordinarily offered to the public" and (s. 15) lists "public transportation" and "a
public place such as a commercial establishment, hotel, restaurant, theatre, cinema, park,
camping ground or trailer park, or ... obtaining the goods and services available there."
New Brunswick (s. 5) uses "accommodation, services or facilities available to the public."
Nova Scotia (s. 5) uses "provision of or access to services or facilities" without further
qualification. P.E.I. (s. 2) uses "accommodation, services and facilities to which members
of the public have access". Newfoundland (s. 7) uses "accommodation, service or facility
available in a place to which members of the public customarily have access or which are
customarily offered to the public". N.W.T. (s. 4) uses "accommodation, services or
facilities available in any place to which the public is customarily admitted". Yukon (s.
8) uses "when offering or providing services, goods, or facilities to the public."

About these differences in wording, Lamer C.J., in University of British Columbia
v. Berg, said:

If human rights legislation is to be interpreted in a purposive manner, differences
in wording between provinces should not obscure the essentially similar purposes
of such provisions, unless the wording clearly evinces a different purpose on behalf
of a particular provincial legislature.44

Services may be provided through private, quasi-government, or government
agencies. As a general rule the courts and boards of inquiry have interpreted these
provisions broadly but the issue of the scope of the provisions is continually argued.
Typically, the argument against the provision of a service being subject to human rights
legislation is based on the proposition that when a service provider sets restrictions and

prerequisites before a member of the public may access the service then the service is no longer generally available to the public at large.

Private service providers have had little success with this argument. A debt collection agency,\(^{45}\) fire\(^{46}\) and automobile\(^{47}\) insurance, and recreational bowling,\(^{48}\) have been held to be services to the public in the face of arguments that the services were provided only to selected portions of the public.

Despite the extremely broad interpretation of the various provisions describing the requirement that the service be provided to the public, human rights legislation still recognizes a separation between public and private spheres of activity. *Gould v. Yukon Order of Pioneers* is an example of a case which turned on the interpretation of what service was provided to the public and what activities remained solely of private interest to the membership. The Order is a fraternal organization which, among other activities, collects historical information about the Yukon. The complainant argued that she was discriminated against because an exclusively male organization would be biased in its choice of what to collect and would fail to properly represent the history of Yukon women. The Board of Inquiry decided that the collection of the historical information was the service provided to the public.\(^{49}\) However, the Court of Appeal held that the service which was offered to the public was access to the historical information which had been collected. The collecting, and more to the point, the choice of what to collect was found to be a "purely private" activity of the group.\(^{50}\)

In another case, the provision of life insurance to a mortgage client was held not

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to be a service to the public but a service only to mortgage clients of the bank "who medically qualify[ed] under the actuarial tables. .".51

These last two cases should be seen as rare exceptions to the prevailing view that a private entity which interacts with the public will be subject to human rights legislation. I use the phrase "quasi-government entities" to include all those agencies which have a high degree of government involvement and which engage in activities which have a high degree of public service but which may not be found to be "government" in a strict sense so as to attract Charter scrutiny. Quasi-government entities which have been found to be subject to human rights legislation include marketing boards,52 public and private schools,53 Workers' Compensation Boards,54 and universities.

In the most recent Supreme Court of Canada decision on this matter, University of British Columbia v. Berg,55 the complainant, a graduate student of the School of Family and Nutritional Sciences, had been refused both a key to the faculty building and a rating sheet required for consideration for internship because of a mental disability. The Supreme Court was required to determine the scope of the phrase "customarily available to the public" contained in s. 3 of the B.C. Human Rights Act. Chief Justice Lamer reaffirmed "that a broad, liberal and purposive approach is appropriate to human rights legislation... It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise

52. Janssen v. Ontario Milk Marketing Board (1990) 13 C.H.R.R. D/397 (that it was a service was not challenged) (Bd. Inq.).
55. Supra, fn. 44.
circumventing the intention of the legislature."

After reviewing previous cases Lamer C.J. said:

Therefore, I would reject any definition of "public" which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public. Students admitted to a university or school within the university, or people who enter into contracts of insurance with a public insurer, or people who open accounts with financial institutions, become the "public" for that service. Every service has its own public, and once that "public" has been defined through the use of eligibility criteria, the Act prohibits discrimination with that public.

Non-discriminatory eligibility criteria may be used to identify those for whom the service is intended or who could best benefit from the service or facility. Those people who meet those requirements then become the "public" in relation to the service provider. Lamer C.J. said:

... In determining which activities of the School are covered by the Act, one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or activities will create public relationships between the School's representatives and its students, while other services or facilities may establish only private relationships between the same individuals.

Where the provision of the service is discretionary, the service provider may not exercise his/her discretion in a discriminatory fashion.

The scope of the service provided and who provides it are factual issues which require clear identification. In Howard v. University of British Columbia a deaf person filed a complaint that the University had discriminated against him when it refused to pay for an interpreter so he could obtain the most benefit from classes. The University argued it did not provide the service of interpreters, claiming that it was merely a facilitator to

56. Ibid, at p. 370-1. Mr. Justice Major, the sole dissenting judge, was of the opinion that the Act would apply to the public seeking admission and those other services of the University which were offered to the public. The provision of a key and completion of a rating sheet were matters unique to the university and not "customarily available to the public. The legislature choose to limit the reach of the Act to services provided to the public and it is not for the Court to extend the scope of the Act."

57. Ibid, at p. 383.


help students get funding from provincial government sources and so was the wrong respondent. The Council Member Designate rejected this claim holding that the service offered was education and the question of interpreters was an element of reasonable accommodation.

The Saskatchewan Court of Appeal has recently summarized the law relating to determining if a government function is a service to the public. The Court recognized that many government programs are designed to remedy particular concerns of particular groups of people. A government service will be a service to the public where the law requiring a department to provide the service is general in nature, eligibility criteria are established, and everyone who meets those criteria is entitled to the service even though not all members of the public require, or can qualify for, the service. The Court quoted, without necessarily approving, Professor Greschner's comment: "A government by its nature has only public relationships with persons, regardless of the source of its authority or the means by which it exercises that authority."  

As Linden J.A. said in *A.G. Canada v. Rosin and Canadian Human Rights Commission*:

> Canadian courts have broadly interpreted these words ["customarily available to the public"]... The essential aim of the wording is to forbid discrimination by enterprises which purport to serve the public.

In order for a service or facility to be publicly available, it is not required that all members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private," leaving outside the scope of the legislation very few activities indeed.

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The 'large and liberal' reading of human rights legislation is now well established. There is a presumption that, if an entity interacts with the public at large or selects portions of the general public to become its public, human rights legislation will apply. It will be the rare situation which escapes this presumption (although some of the statutes exempt religious and philanthropic institutions).

If practically every entity which deals with the public is covered by the legislation why are the majority of services and facilities still not physically accessible? In the next section I will review the various legal limitations which may be placed on the right to an accessible environment but the answer to this question does not lie entirely with the state of the law. I will explore some of the administrative reasons for the ineffectiveness of human rights legislation later in this chapter.

E. Limitations on Protection Provided:

In most human rights legislation the prohibition against discrimination in the provision of services is limited by general and specific exception clauses. In the absence of a limitation clause the courts will read one into the legislation. For convenience these exceptions will be referred to as 'bona fide justifications' or simply 'bfj'.

i. General Legislative Limitations:

General legislated limitations adopt one of two approaches: a simple bona fide justification exception or a bona fide justification exception which specifically incorporates a requirement for reasonable accommodation.

An example of the first approach is found in the Canadian Human Rights Act
which provides:

S. 15 It is not a discriminatory practice if . . .
(g) . . . an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.63

Other jurisdictions have enacted variations on this theme. British Columbia: (s. 3(1)) "No person, without a bona fide and reasonable justification, shall [discriminate in the provision of services]"; Alberta: (s. 11.1) there is no violation if the respondent "shows that the alleged contravention was reasonable and justified in the circumstances"; New Brunswick and Newfoundland: each section specifies there is no violation where there is a "bona fide qualification as determined by the Commission"; Nova Scotia: there is no violation (s. 6(e)) "where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity" or (s. 6(f)) "where a denial, refusal or other form of alleged discrimination is (i) based upon a bona fide qualification, or (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society"; Prince Edward Island: (s. 14(1)(d)) there is no violation for "...a refusal, limitation, specification, or preference based on a genuine qualification".

Later in this chapter I will explain why I am of the view that even without a specific reference to reasonable accommodation these statutes will be interpreted to include reasonable accommodation in cases of indirect discrimination and a functionally equivalent concept in cases of direct discrimination.

The second approach is used in Manitoba and the Yukon. In the Manitoba act each section specifies there is no violation where, after reasonable accommodation is made, "bona fide and reasonable cause exists for the discrimination". Section 9(d) of the Yukon act provides that there is no violation if the treatment is based on "...other factors

establishing reasonable cause for discrimination", which incorporates, via s. 7(1), the principle of reasonable accommodation subject to undue hardship, taking into account safety, disruption to the public, the effect on contractual obligations, financial cost, and business efficiency.

The *Ontario Human Rights Code* is unique. Although s. 11 provides a *bif* exception taking into account reasonable accommodation for adverse effect, or indirect, discrimination there is no equivalent for cases of direct discrimination. As will be seen later, the essence of a *bif* defence is that it is class based and exempts the respondent from having to do individual assessment or making reasonable accommodations. In Ontario the only defence to claims of direct discrimination is set out in s. 17 which requires an individual assessment in each case taking into account a duty to reasonably accommodate.65

64. Section 11, dealing with adverse effect discrimination, referred to as "constructive discrimination" provides:

11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

11(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

65. S. 17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
ii. General Implied Limitations:

Saskatchewan, Québec, and the Northwest Territories are the only jurisdictions whose legislation still contains no general limitation clause on the prohibition against discrimination in the provision of services.

In O'Malley the employer had indirectly discriminated against the complainant when it required her to work on a Saturday despite the fact that her religion prohibited her from working on the Sabbath which extended from Friday to Saturday sunsets. The Ontario legislation in effect at that time made no provision for any exception to the prohibition against religious discrimination. The Court rejected the suggestion that this absence meant either that intention was a requirement to a finding of discrimination or that such a finding would automatically lead to a remedy. The Court filled the legislative lacuna by importing the concept of reasonable accommodation. The Court held that respect for religious freedom required that society act within reason to protect the right. It said that respect for the employee's right required the employer to reasonably accommodate the employee's needs, short of undue hardship.

On the basis of O'Malley, it is safe to say that a similar limitation will be read into the legislation of the three jurisdictions with no legislated general limitation in cases of indirect discrimination. Because the principle applied in O'Malley was that there were limits to the rights protected even if the legislature had not spelled them out I think a similar reading in would occur in a case of direct discrimination.

66. But there is a limitation on remedy in ss. 31(9) and (9.1) whereby a Board of Inquiry may not make an order which imposes undue hardship if the cause of the discrimination is the physical structure of the facilities in question.

67. Although the Québec Charter of Human Rights and Freedoms contains no general limitation clause related to services, the Act to Secure the Handicapped in the Exercise of Their Rights establishes a unique system of mandatory planning to provide services and facilities to meet the needs of disabled people and a form of employment equity planning for disabled people. This Act limits the right to file complaints under the Québec Charter. See infra, fn. 132.

68. Supra, fn. 4.
a. *Bona Fide* Occupational Requirements:

The general legislative limitations respecting services mirror the limitations respecting employment. There is, however, very little jurisprudence dealing with these limitations as they relate to services. Since the wording is so similar (indeed, the Nova Scotia and Prince Edward Island acts use the same subsections to enact the general limitation for both employment and services) it is reasonable to consider the courts’ interpretation of the *bona fide* occupational requirement exception ("bfor") as a guide to the interpretation of *bfj*.

The only Federal Court of Appeal case which deals with the *bona fide justification* defence in the *Canadian Human Rights Act* is *Rosen v. Canadian Armed Forces*. Rosin was removed from a parachute course he was participating in as a member of the militia because he had vision in only one eye. On the interpretation of the *bfj* defence Linden J.A. said:

Similarly, it might be concluded that the two phrases -- "*bona fide occupational requirement*" (as in s. 15(a)) and *bona fide justification*" (as in s. 15(g)) [of the *Canadian Human Rights Act*] convey the same meaning, except that the former is applicable to employment situations, whereas the latter is used in other contexts. The choice of these different words used to justify *prima facie* discrimination, therefore, are matters of style rather than of substance.69

Since the interpretation of the *bfor* defence is the best available guide to how the courts will interpret the *bfj* defence, in this section I will review the evolution of the *bfor* defence. The majority of the Supreme Court of Canada diverged from the well established understanding of the *bfor* defence in its 1985 decision in *Bhinder v. CN Rail*. My review of subsequent cases shows how the Supreme Court revised its interpretation of the *bfor* defence to the point where it is very different from the pre-*Bhinder* understanding of this

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69. *Supra*, fn. 61, at p. D/453. In *Canadian Paraplegic Association v. Elections Canada*, *supra*, fn. 19, the Tribunal transposed the employment test to a services case (incorrectly as it happened, because the Tribunal applied the test for direct discrimination not the test for indirect discrimination which was at issue in this case). In *Trudeau v. Chung* (1991) 16 C.H.R.R. D/25, the B.C. Council Member Designate transposed the *O'Malley* principles to a case involving the renting of an apartment.
concept and rarely available.

A *bona fide* occupational requirement is a class based defence. A *bfor* is founded on the proposition that no member of the excluded class can "reliably, safely, and efficiently" perform the function or, if there are some exceptions, it is not reasonably possible to determine who the exceptions are.

In cases where an individual is excluded from employment because of the individual characteristics of his/her disability the defence is not a *bfor* but an individual application of the general rule that an unqualified person does not have to be hired. Most human rights acts make no reference to this principle but it is reflected in s. 17 of the Ontario *Human Rights Code* and s. 6(e) of the Nova Scotia *Human Rights Act*. For example, in *Friesen v. Regina (City) Commissioners of Police* the complainant's left hand was slightly disabled. His application to the police force was refused when he failed to hold a gun in a manner acceptable to the interviewing officer. It was agreed there was no blanket rule respecting hand condition and so the *bfor* defence was inapplicable. Since there was no *bfor* defence available, the respondent had to show that the complainant, who was rejected because of disability, was unqualified because of his disability; in this case, that he had been properly individually assessed and was unable to meet a legitimate requirement of the job. The Board of Inquiry held that:

> The [assessment] test must be reasonable and objective and demonstrate that the person being tested cannot perform the task required. More simply put, Mr. Friesen was entitled, not just to a test, but to a fair test.

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70. *Supra*, fn. 65.
71. *Supra*, p. 121.

> S. 16 (1) A right of a person under this Act is not infringed for the reason only,

> (b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of a handicap.
An initial question before reviewing the various decisions related to the *bfo* defence is whether the different formulations of the defence used by the various jurisdictions affect the interpretation of the concept. In *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, speaking of the effect of the different wording between the Ontario (at the time of *Etobicoke*) and Saskatchewan legislation, Sopinka J., *per curiam*, held that the difference in wording did not materially alter the nature of the defence. In *Alberta (Human Rights Commission) v. Central Alberta Dairy Pool* Wilson, J. held that there was no difference in interpretation arising from the difference between the federal and Alberta wording. Similarly, the different formulations of the general limitation clauses respecting services make no difference to the actual scope of the exception.


75. Ontario:

S. 2 The provisions of this section relating to any discrimination... for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a *bona fide* occupational qualification and requirement for the position or employment. R.S.O. 1970, c. 318, as amended S.O. 1974, c. 73.

Saskatchewan:

16(7) The provisions of this section relating to any discrimination... for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement...


77. Canada:

S. 15 It is not a discriminatory practice if

(a) any refusal... is established by an employer to be based on a *bona fide* occupational requirement;

Alberta:

S. 7(1) No employer or person acting on behalf of an employer shall

(a) refuse to employ or refuse to continue to employ any person...

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational qualification.

78. In *Berg, supra*, fn. 44. at p. 362, Lamer C.J., considering the different formulations of "customarily available to the public", said:

Although many legislatures have chosen different verbal formulae to so restrict the application of human rights legislation, the basic motivation behind such limiting words is clear: the legislature did not wish human rights legislation to regulate all of the private activities of its citizens.

And later, at p. 373:

If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.
The classic description of the *bfo* defence is found in *Ontario Human Rights Commission v. Etobicoke*, in which McIntyre J. said:

To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.79

In that case the evidence provided to justify the mandatory retirement policy was insufficient. That decision did not disturb the then current view that even if a policy was a *bfo* there was still a duty to reasonably accommodate those who could not meet the requirement.

The Supreme Court dealt with this issue for the first time in *Bhinder v. CN Rail* in which a Sikh was terminated from his employment when he could not meet the newly imposed requirement to wear a hard hat on the job. Section 14(a) (now 15(a)) of the *Canadian Human Rights Act* provided that "It is not a discriminatory practice if . . . any refusal . . . [is] based on a *bona fide* occupational requirement". McIntyre J., speaking for the plurality, held that once an occupational requirement was found to be *bona fide* there can be no requirement under the statute to apply it on an individual basis: "To conclude then that an otherwise established *bona fide* occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language."80 Wilson J., concurring, added: "[T]he purpose of s. 14(a) seems to me to be to make the requirement of the job prevail over the requirements of the employee. It

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79. *Supra*, fn. 6, at 208. This test is consistently referred to in the cases which follow. As recently as *Dickason v. University of Alberta*, *supra*, fn. 5, at p. D/121, L’Heureux-Dubé J. called it the "current BFOQ test".

negates any duty to accommodate by stating that it is not a discriminatory practice."\(^{81}\)

Since there is no discrimination the issue of accommodation never arises.

Chief Justice Dickson, dissenting, said "[t]he words 'bona fide occupational requirement,' in isolation, are elastic in the sense they are capable of having more than one meaning" and should be interpreted so as to give maximum effect to the objective of the statute. He said:

The words "occupational requirement" mean that the requirement must be manifestly related to the occupation in which the individual complainant is engaged. Once it is established that a requirement is "occupational", however, it must further be established that it is "bona fide". A requirement which is prima facie discriminatory against an individual, even if it is in fact "occupational", is not bona fide for the purpose of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would result if an exception or substitution for the requirement were allowed in the case of the individual. In short, while it is true the words "occupational requirement" refer to a requirement manifest to the occupation as a whole, the qualifying words "bona fide" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual.\(^{82}\)

The Bhinder decision was severely criticized and seen as a marked departure from the interpretation of the bfor defence which was current among human rights professionals. The decision was seen as a substantial limitation on the ability of human rights law to achieve its objective particularly in relation to disabled people.\(^{83}\)

*Commission des droits de la personne du Québec v. Town of Brossard* was a case involving the application of s. 10 of the Québec *Charter of Human Rights and Freedoms* to a town policy prohibiting the employment of a person if an immediate relative was already employed. The complainant was refused employment as a summer lifeguard because her mother worked as a typist in the police department - a case of direct discrimination. Section 20 of the *Charter* provides: "A distinction, exclusion, or

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83. See, for example, *Special Report to Parliament on the Effects of the Bhinder Decision on the Canadian Human Rights Commission*, CHRC.
preference based on the aptitudes or qualifications required in good faith for an employment . . . is deemed non-discriminatory."

Mr. Justice Beetz, after determining that the subjective branch of the *Etobicoke* test had been met, said:

The respondent must also demonstrate that the aptitude or qualification is related in an objective sense to the performance of the employment concerned. McIntyre J. suggested in *Etobicoke* that the purpose of the objective test is to determine whether the employment requirement is "reasonably necessary" to assure the performance of the job. In the case at bar, I believe that this "reasonable necessity" can be examined on the basis of the following two questions:

(1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question. In *Etobicoke*, for example, physical strength evaluated as a function of age was rationally connected to the work of being a fireman.

(2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The sixty-year mandatory retirement age in *Etobicoke* was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job.84

Although Beetz J. found the rule to be rationally related to the needs of ensuring a public service free of conflict of interest, he found it was not sufficiently tailored to the nature of the positions and the impact on individuals and, therefore, the rule had to be struck down.

Wilson J., concurring, said that the policy objective of ensuring a public administration which is free of nepotism was a legitimate objective and policies which implemented that objective were acceptable. However, she adopted the view of Beetz J. that "less drastic means are available and could and should have been employed in this

In Saskatchewan (Human Rights Commission) v. Saskatoon (City) the Supreme Court of Canada again had the opportunity to consider a mandatory age of retirement policy for firefighters. Sopinka J., per curiam, said that the essence of the bfor defence was that it was group based. If individual assessment could be carried out then there would be no need for the defence. He said that the test set out in Etobicoke obliges the employer to show that the requirement, although it cannot necessarily be justified with respect to each individual, is reasonably justified in general application. This interpretation was reaffirmed in Bhinder... The dichotomy between an individualized approach and an approach based on average characteristics is of the very essence of a defence of this kind. ... [I]f an employer were required to show that each employee at age sixty is physically incapable of doing the work, there would be no necessity of a defence of reasonable occupational qualification or requirement. The employer in the circumstances to which I refer would have negated discrimination.86

It is not, however, necessary to show that everyone in the excluded class is incapable of fulfilling the requirements of the job to meet the requirements of the bfor defence. It is enough to show that almost everyone would be incapable and it would be impossible or impracticable to test each individual. Sopinka J. held that the standard which is required to establish necessity is "one of reasonableness".87

The essential class based foundation of the bfor defence is reflected in Sopinka J.'s comment: "[I]n the limited circumstances in which this defence applies, it is not individual circumstances that are determinative but general characteristics reasonably applied".88 He rejects any need for individual testing once a bfor is made out. He said:

While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis by, inter alia, individual testing. If there is a practical alternative to the adoption of a

85. Ibid, at p. 656.
86. Supra, fn. 74, at p. D/212.
discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it. 89

This passage is not as clear as it might be, but I think it means that if it is reasonably possible to do individual assessments an employer will not be able to rely on a bfor defence. This is because the ability to do individual assessments negates the requirement to apply a blanket policy to the class of individuals affected.

In Alberta (Human Rights Commission) v. Central Alberta Dairy Pool 90 Madame Justice Wilson said that she thought the majority in Bhinder may have been wrong in concluding that the hard hat rule was a bfor. The first reason was that the Tribunal had found that if Bhinder did not wear the hard hat it would not hinder his ability to work nor affect the safety of co-workers, although there would have been a marginal increase in risk to himself. She said it was "difficult to support the conclusion of the majority of the Court that the hard hat rule was reasonably necessary for the safety of Mr. Bhinder, his fellow employees and the general public". 91 If the rule was not a bfor it would have to be struck down. However, as Wilson J. noted, the rule was generally sensible and striking it for people for whom wearing a hard hat would not interfere with their rights would "seem to be both unnecessary and counter-productive". 92

To avoid this anomalous result, Wilson J. found a second reason why Bhinder was wrongly decided. In that case it was assumed the bfor defence applied to both direct and adverse effect discrimination. She said:

Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is

90. Supra, fn. 76.
not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "groups" adversely affected may comprise a minority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship.

... For these reasons, I am of the view that Bhinder is correct in so far as it states that accommodation is not a component of the BFOR test and that once a BFOR is proven the employer has no duty to accommodate. It is incorrect, however, in so far as it applies that principle to a case of adverse effect discrimination.  

She argued that Brossard did not divert from the Court's jurisprudence on bfor but only approved the proposition that "[i]f a reasonable alternative exits to burdening members of a group with a given rule, that rule will not be bona fide."  

It should be noted that in O'Malley the court was dealing with a statute that had no statutory defence to a prima facie case of discrimination based on religion. The decision to allow a discriminatory rule to stand subject to reasonable accommodation was made to fill a legislative vacuum. In Bhinder the statute clearly stated that it was not discrimination if there was a bfor but that does not mean that reasonable accommodation cannot be an element in the determination of whether there is a bfor in the particular case.

The effect of Alberta Dairy is that the bfor statutory defence is available in cases of direct discrimination but not in cases of adverse effect discrimination. In the latter case the defence is the implied limitation 'read in' by the O'Malley decision. This defence has been described by William Pentney as "the defence of business rationality and

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duty to accommodate short of undue hardship. . . 95

Distinguishing in this way between direct and indirect discrimination was strongly
criticized by Sopinka J., concurring for different reasons, who argued, in Alberta Dairy,
that it had no statutory basis. It was his view that

[b]y virtue of O'Malley there is a duty to accommodate in religious discrimination
cases by reason of the general intent and spirit of the Code. In a case such as
O'Malley, in which a duty to accommodate arises but the statute contains no
BFOQ96, the employer can discharge the duty only by showing that all
reasonable efforts have been made to accommodate individual employees short
of creating undue hardship for the employer. This does not change because of the
addition of a statutory defence of BFOQ. The addition of the defence is relevant
to the discharge of the duty but not to its existence.97

Sopinka J. accepts that once the bfor defence is made out, "there is no basis for
an individual examination of the circumstance of each employee. The question, however,
is how the BFOQ is established having regard to the duty to accommodate".98 A
"prerequisite to a successful BFOQ defence is a showing that there was no reasonable
alternative to a rule that does not take into account the individual circumstances of those
to whom it applies."99 He says that, if the employer fails to provide an explanation as to
why individual accommodation cannot be accomplished without undue hardship, this will
ordinarily result in a finding that the duty to accommodate has not been discharged and
that the bfor has not been established.

Sopinka J.'s reasoning is somewhat obscure. In some places he suggests that
reasonable accommodation can co-exist with a bfor and in others he suggests that if
reasonable accommodation is possible the employer will have failed to demonstrate that

95. Justice W.S. Tarnopolsky, revised by W.F. Pentney, Discrimination and the Law, 5th Cumulative
Supplement, p. 28. A discriminatory rule which is not rationally related to the business will be struck
down. This approach would not apply in those jurisdictions where the legislation specifically
incorporates a requirement for reasonable accommodation into the bfor defence.

96. "Bona fide occupational qualification", used by Sopinka J. interchangeably with bfor.

97. Supra, fn. 76, at p. D/443.


its requirement is reasonable and the bfor defence would fail. Sopinka J.'s approach would also lead to the anomalous result that concerned Wilson J. - that no one would wear a hard hat even though it might be good for them and would not offend a right they claimed. However, an employer could easily reformulate the rule to allow for reasonable accommodation if it believed the rule was generally beneficial or health and safety laws might impose the rule subject to the accommodation required by human rights legislation.

Dickason v. University of Alberta is the most recent case in which the Supreme Court has dealt with the bfor defence. This was another mandatory retirement case, dealing with university professors. Section 11.1 of the Alberta Individual Rights Protection Act provided that there was no contravention of the prohibition against discrimination because of age if it was shown "that the alleged contravention was reasonable and justifiable in the circumstances". Because the Supreme Court had previously decided that mandatory retirement did not violate the Charter of Rights and Freedoms the judgements examine the linkage between the Charter and human rights legislation. Mr. Justice Cory, speaking for the majority, agreed that s. 1. Charter jurisprudence could be used in interpreting human rights legislation provisions which permit "reasonable and justifiable" breaches of the prohibition against discrimination as long as the vital difference between the Charter and human rights legislation is kept in mind. That vital difference is that the Charter applies to government and human rights legislation applies to private parties. A challenge to legislation requires that the court review the impugned legislation with an appropriate measure of deference to the legislature. On the other hand, no deference is due to the decisions of private parties.

100. This approach still has the result that if a requirement is a bfor the employer does not have to attempt to accommodate individuals for whom the rule has a discriminatory effect. Dickson C.J., in Bhinder, supra, fn. 16, was clear that in his view the duty to accommodate was an integral part of the bfor defence (supra, fn 82).


102. Supra, fn. 5, at p. D/97. The Court did not discuss the measure of deference due when human rights law is applied to discriminatory legislation.
The analytical model set out in *R. v. Oakes*\(^{103}\) to interpret the Charter may assist in developing the test for s. 11.1 (and by implication similar human rights legislation) with the proviso that it be applied only with great flexibility and that the inquiry into what is reasonable and justifiable under the *Act* not be constrained by the formal divisions within the *Oakes* test.

Despite these comments, except regarding the matter of deference, Cory J. goes on to describe an analytical model essentially identical to that set out in *Oakes*. He said:

A party seeking to establish a defence pursuant to s. 11.1 must demonstrate that the discriminatory practice furthers a substantial objective and is proportional to that objective. In considering the defence, no deference should be given to the policy choice of the defendant as would be the case in the s. 1 analysis of a social policy.\(^{104}\)

After holding that, just as in *McKinney*,\(^{105}\) the University’s objectives for imposing mandatory retirement were pressing and substantial he assessed the evidence of proportionality in terms of rational connection, minimal impairment, and proportionality of effects. Based on his analysis of the evidence he determined that the policy met the test for s. 11.1. It is to be noted that Cory J. made no reference to the subjective element of the *Etobicoke* test.

L'Heureux-Dubé J., dissenting in the outcome, agreed that policies of private actors should be given no deference in assessing them against the standard required by s. 11.1. L'Heureux-Dubé J. said that the similarities between the *Oakes* test and the two-part *Etobicoke* test (the subjective and the objective elements) justify interpreting *bfor* defences in a manner consistent with the *Oakes* test. Although her references to the subjective element are very brief it is clear she retains a subjective element in assessing a *bfor*. On the objective element she agreed with Cory J.'s outline of the analytical model.

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which, again, looks essentially the same as Oakes. She then went on to find that, on her interpretation of the evidence, the policy did not meet these tests.

In his dissenting judgement, Sopinka J. also emphasized the similarities and dissimilarities between the Charter and human rights legislation. He said:

In my view, it must be stressed that the tests developed for the application of s. 1 of the Charter and the defence to discrimination under human rights legislation, commonly referred to as BFORQ [bona fide occupational requirement or qualification], are similar. While the former as expounded in Oakes is more elaborate, they both require that the impugned measure bear a rational relationship to a legitimate objective. In the case of an employer, the objective is usually the efficient and economical operation of the employer's business or activity. Section 11.1, therefore, is essentially a generalized BFORQ which, while worded more generally than the provision with which we dealt in Ontario Human Rights Commission v. Borough of Etobicoke, . . . serves the same purpose. Accordingly, while it is appropriate to apply the jurisprudence developed under s. 1 as a guideline, when that guideline is wanting we should interpret s. 11.1 by reference to the jurisprudence relating to the BFORQ. In this regard I therefore see no reason to depart from the test which was enunciated by McIntyre J. in Etobicoke and adopted by Beetz J. in Brossard.

L'Heureux-Dubé and Sopinka JJ. are clearly retaining the two-part test first described in Etobicoke.

The Dickason decision, which dealt with a case of direct discrimination, confirmed the previous direction of the Court. The defence to a prima facie case of direct discrimination is the statutory bfor. A bfor applies to a policy which is reasonably necessary to achieve a legitimate objective, applies to everyone, and for which no reasonable alternative exists. In Etobicoke McIntyre J. said of the mandatory retirement

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106. Ibid, at p. D/128. She said:

In assessing the reasonableness and justifiability of the University of Alberta's mandatory retirement policy under s. 11.1 we must first examine the University's purposes in establishing the policy and ask whether these goals are legitimate or, in Charter terms, "pressing and substantial". Next, we must assess whether the policy is rationally connected to the goals it purports to further. If the University's goals are legitimate, and if the policy used to further those goals is rationally connected to them, we must then ask whether there is an alternative to the discriminatory policy and, specifically, whether the employer has shown why individual testing is not feasible in the circumstances. Throughout, we must bear in mind that the standard of proof upon the respondent is strict, akin to the s. 1 standard set out in Oakes. The employer must not merely show that its discriminatory policy is a reasonable alternative, but that it is the least burdensome option available, the one which least infringes on employees' rights while furthering the employer's legitimate goals.

policy for fire fighters: "In addition, [the policy] must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." In this case the objective of the policy was to protect the employees from injury and to ensure the fire department could deal with fires (which required employees who had the physical abilities to do the job).

Most human rights complaints dealing with disability and employment involve a refusal to hire because of a policy forbidding the employment of a person with the complainant’s medical condition. In these cases McIntyre J.’s words guide the investigation and analysis of the complaint. I have used the phrase "reasonably necessary to achieve a legitimate objective" to show that McIntyre J. was merely giving an example relevant to the case he was dealing with. In Brossard, for example, the policy was designed to ensure a municipal government was not corrupted by nepotism. There was no argument that nepotism in hiring would reduce the quality of work performance but that nepotism was contrary to the political expectations of fair hiring by a government in Canada. In a case like this McIntyre J.’s words have to change to something like "the policy must be related in an objective sense to the legitimate objective of ensuring fair hiring policies in a municipal government, in that it is reasonably necessary to ensure that municipal hiring policies are not subverted by nepotism."

The bfor defence still does not include a duty to accommodate but the threshold to prove the defence has been raised so high that it will rarely be successful. For example, if it can be shown that it would be easy to show how a person could do that job safely and effectively without meeting the requirement the employer will have failed to show that the policy is reasonably necessary. A policy which does not meet the requirements for the bfor defence will be struck down. The rule must not be disproportionate to the objective.

108. Supra, fn. 79.
109. Supra, fn. 7.
The concept of reasonable accommodation is subsumed into the search for reasonable alternatives to the policy. The respondent must show why, as a "practical alternative", it was not possible to individually assess the risk presented by each individual or otherwise meet the legitimate objective the policy was designed to achieve.

It is possible the Court will press this line of argument to the point where if it can be shown that a single individual can be reasonably accommodated the policy will not be upheld as a *bfor*. In functional terms this will require an employer who wishes to impose a rule of general application to formulate that rule in a way which allows reasonable accommodation unless it is satisfied that no exceptions can ever be made.

The defence to a *prima facie* case of adverse effect discrimination is the doctrine of business rationality subject to the duty to accommodate short of undue hardship. This defence applies to a policy which is facially neutral in its design and application, rationally related to a legitimate objective, and in circumstances when it is impossible or impracticable to reasonably accommodate individuals who cannot meet the demands of the policy without undue hardship to the employer.

Although the doctrinal descriptions of the two defences are clearly very different, it is arguable that in practical terms the employer will have to prove the same facts. In a case of direct discrimination the employer will have to show that there was no other reasonable alternative to the exclusionary policy, and in cases of indirect discrimination the employer will have to show there was no way to reasonably accommodate the individual. In the former case if it is possible to accommodate individual needs the policy is not a *bfor* and will be struck down. In the latter case if it is possible to accommodate individual needs the policy is allowed to stand but the individual needs will have to be accommodated short of undue hardship.\(^{110}\)

b. *Bona fide* Justification:

The *bona fide* justification defence is simply the services equivalent to the *bona fide* occupational requirement defence. It follows that the other defences to employment discrimination apply equally.

In cases of direct discrimination not based on a general rule the respondent will have to show that it individually tested the ability of the complainant to utilize the service and the complainant was unable to do so because of a disability. Except in Ontario\textsuperscript{111}, it is unclear whether, or to what extent, reasonable accommodation short of undue hardship will have had to have been made in order to determine if the assessment test was fair, although it would seem that failure to accommodate so a person could show his/her true ability would be an unfair test.

In cases of direct discrimination based on a rule of general application the subjective element of the *bfj* defence requires a showing that the rule was formulated and applied in good faith and in the sincerely held belief that it was necessary to achieve the legitimate objective in question. In addition to this subjective aspect, the rule must be related in an objective sense to the provision of the service in that it is reasonably necessary to achieve that legitimate objective. The standard which is applied is one of 'reasonableness'. The *bfj* defence is premised on average characteristics of the defined group: it requires that the service provider show that the requirement, although it cannot necessarily be justified with respect to each individual, is reasonably justified in general application. The service provider will have to show that all people adversely affected by the rule are unable to avail themselves of the service or that it is impossible or impracticable to identify particular individuals within the group who could use the service.

Whether the policy is reasonably necessary can be assessed by a form of

\textsuperscript{111} *Supra*, fn. 65.
proportionality test as described in *Dickason*. This calls for an inquiry about whether the rule is rationally connected to a legitimate objective, whether it minimally impairs the rights of the affected group, and whether there is any other reasonable way to achieve the same objective without, or with less, discriminatory impact. If the rule is not saved as being a *bif* then it is struck down in its entirety.\(^{112}\)

In cases of adverse effect discrimination the *bif* defence is not available. Instead the defence of business rationality linked to a duty to accommodate short of undue hardship devised for employment should be equally applicable to services. This defence applies to a rule which is honestly imposed for genuine business reasons and is equally applicable to all to whom it is intended to apply. Such a rule will continue to apply in its general application but the respondent will have to reasonably accommodate, up to the point of undue hardship, individuals who cannot follow the rule, or for whom the rule imposes additional burdens, because of their disability (or other prohibited ground of discrimination).

As exceptions to the general non-discrimination rule these defences are to be narrowly construed. The burden of proof is on the one pleading the *bif* or that an accommodation would be an undue hardship. The objective element of both defences, that the rule is reasonably necessary to achieve a legitimate objective, requires credible evidence. While empirical or scientific studies are more persuasive, such evidence is not required. Where such evidence does not exist the opinion of an expert may be relied upon.\(^{113}\)

Of the various reasons proposed to justify discriminatory policies many are of more interest to the respondent than the complainant. In *Dickason* one of the reasons for the

\(^{112}\) In those jurisdictions which have included a requirement for reasonable accommodation in the statutory defence the same analysis could be used to determine if there was a *bif*. These provisions, see, for example, s. 11 of the *Ontario Human Rights Code, supra*, fn. 64, reflect the analytical approach set out in *Dickason*.

\(^{113}\) *Etobicoke, supra*, fn. 6.
mandatory retirement policy was to renew the teaching staff to ensure the University was up to date and vigourous. Dickason was more interested in keeping her job. Effective delivery and the safety of service delivery is equally important to both parties.

For a respondent effective delivery includes elements of efficiency and economy. For a complainant effective delivery means that the service is actually useable and of equivalent value or effect. There is nothing inherent in this concept that suggests that alternate delivery mechanisms are not acceptable if they result in equally effective delivery. Both measuring and assessing the concept of effective delivery are strongly influenced by the particular facts available at the time and by public policy.

Safety should be assessed by determining the likelihood of the risk occurring and the magnitude of the consequences if it does occur, in relation to the risk everyone takes in the use of the service. The degree of probability and magnitude of risk which is reasonable to accept will vary depending on whether the risk is to the individual or the public.\(^{114}\) It is important to compare the probability of the risk between a non-disabled and a disabled person and determine if that risk is greater because of the disability as well as determine the relationship between the disability and the safety hazard.\(^{115}\) The test is whether there is a sufficiency of risk of individual failure. A sufficient risk is one that is substantial, not negligible. This is, of course, a highly subjective concept and the outcome of any particular case will depend on the facts available and the value the decision maker places on the competing interests of the parties and the public. The weight given the risk factor varies in descending order as it relates to risk to others, risk to the complainant (assuming full disclosure of risk factors), and risk to property. Assessing risk requires balancing the willingness of the individual to accept the risk, the increased risk

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115. See, for example, DeJager v. Department of National Defence (1986) 7 C.H.R.R. D/3508, a case involving employment as a boatswain of a person with asthma. The discussion of risk was based on CHRC bfor guidelines which have been repealed but the principles involved remain in effect.
to other people, the other types of risks the enterprise assumes in the course of business, and the types of risks tolerated in society in general.116

The most extensive discussion of safety concerns in relation to the provision of service occurred in *Woolverton v. B.C. Transit*117. The B.C. Council Member Designate considered what standard should be applied to assess the respondent’s concerns about safety in relation to the undue hardship concept. The Member Designate said that where safety is a concern both the magnitude (including the extent and the size of the risk and the likelihood - possibility - of it occurring) and the identity of those who must bear the risk are the relevant factors. Her view of the evidence regarding the scientific study of the safety in the transportation of people using various mobility aids was that it was in its "infancy" but that "tremendous strides" had been made in the last decade. What little evidence related to risk there was showed more likelihood of risk to the scooter user than the wheelchair user. However, on balance, the Member Designate determined that the respondent was unable to show that transporting people using the scooters was sufficiently more risky than transporting users of wheelchairs. Since the onus was on the respondent to justify its policy, it had failed to provide sufficient evidence to do so. To weigh the appropriate balance between the respondent’s concern for safety and the complainants’ concern for accessible transportation the importance of the service to the complainants must be considered. Transportation is very important and disabled people have the right to accept the risk to them from using the service while seated in their scooters. The lack of information about the magnitude and possibility of risk obviated the need for the

116. See generally Mr. Justice MacGuigan’s judgement, concurring in result, in *Air Canada v. Carson* [1985] 1 F.C. 209. In *Canadian Pacific Limited v. Canada (Canadian Human Rights Commission)* and *Mahon* [1988] 1 F.C. 209, the Federal Court of Appeal held that the issue was proof merely of the reality of the risk not its sufficiency. This decision has been implicitly overruled by *Alberta Dairy*, supra, fn. 76, and specifically rejected in *Rosin*, supra, fn. 62.

However, this view was rejected by the majority in *Canadian Human Rights Commission v. Canadian Armed Forces and Husband*, F.C.A., April, 1994, unreported. In that case Isaac J.A. specifically rejected the proposition that *Alberta Dairy* or *Rosin* had altered the test for degree of safety set out in *Mahon*.

Member Designate to consider how much risk was acceptable before an undue hardship was placed on the respondent.

c. Reasonable Accommodation Short of Undue Hardship:

The duty to reasonably accommodate only applies in those jurisdictions which have incorporated the concept into their definitions of $bior$ or $bif$ or in cases of adverse effect discrimination. Although it may seem redundant, since if an accommodation imposes an undue hardship how can it be reasonable, the phrase "reasonable accommodation" is always accompanied by the limitation "without", or some such similar words, "undue hardship". The exact content of this concept is currently very uncertain. There are few reported cases dealing with reasonable accommodation and those contain only brief and general discussions of the nature and scope of reasonable accommodation.

Mr. Justice Sopinka, in *Renaud v. School District No. 23 (Central Okanagan)*, described the purpose of accommodation as follows:

> The duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by the *bona fide* adoption of a work rule without any intention to discriminate. It enabled the employer to justify adverse effect discrimination and thus avoid absolute liability for consequences that were not intended.\textsuperscript{118}

This is a very limited view of its purpose and is simply inadequate if the concept is to be of significant benefit. The purpose of reasonable accommodation should be seen as a method to maximize the opportunities of people who, because of some particular characteristic, are unable to meet a rule of general application or for whom such a rule imposes a greater burden. Its purpose should be to ensure that individuals are not unreasonably excluded because they cannot meet the explicit or implicit requirements of rules that are generally facially neutral, sensible, or beneficial to the activity in question.

What is reasonable is a subjective judgement. The scope of reasonable accommodation is a public policy question on which, unfortunately, the legislatures have given very little guidance. Reasonable accommodation should be seen as a political choice designed to allow maximum participation of members of all groups in every opportunity provided by our society. The objective of reasonable accommodation is to ensure that disabled people (and other minorities) are not more burdened or more disadvantaged than non-disabled people (or people not within the minority in question). For example, transcribing text into braille or recording it on audio tape and providing sign language interpreters merely equalizes the opportunity of people to make use of goods and services. The expectation that disabled people should be accommodated so as to remove artificial barriers to their full enjoyment of life is little different from accommodations already readily accepted in our society. Maternity and child care leave are accommodations for women and parents to protect their employment during and after pregnancy. Types of accommodation seen in other areas are the provision of child care expenses to women to remove or reduce that barrier to their employment opportunities or providing flexible work schedules to eliminate that barrier to aboriginal employment in the North.

The amount and types of accommodation which are reasonable depend on the perspective of the decision maker. If one wants to accommodate someone it becomes much easier to see that the proposed action is reasonable. If one does not want to accommodate, or is doing so only grudgingly, then the difficulties with any proposed course of action grow to undue proportions.

The Council of Canadians with Disabilities urges a broad interpretation of reasonable accommodation. Accommodation may require adjustments to the environment (eg: lighting, ventilation, etc.), the physical structure (adjusting table heights, relocating switches, providing sound and light signals, and other minor worksite adjustments), or job structuring (eg: task modification or task elimination, or a mixture of both, and flexible/part time work). It may require the provision of support services (eg:
readers, personal care attendants) or special equipment (eg: computers which read print).

Each case must be assessed individually considering the types of accommodation which are possible, the degree of benefit to the particular disabled person (and to others to follow), and the size and financial position of the employer or service provider. Reasonable accommodation should be designed to assist the individual. In relation to accessibility rights it is an interim step to proper accessibility and even when everything is accessible some people will still need it. In other cases, where providing identical access would be too expensive, reasonable accommodation is a mechanism to provide equally effective access without incurring excessive costs.

The 1983 U.S. Commission on Civil Rights report defines reasonable accommodation as "... providing or modifying devices, services, or facilities, or changing practices or procedures in order to match a particular person with a particular program or activity."  

In O'Malley the Court asked itself to what extent others had to accommodate the needs of an individual to practice her religion. Mr. Justice McIntyre said:

Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complaint, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. . . . The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

Madame Justice Wilson, in Central Alberta Dairy Pool, set out a number of factors that could be relevant to determining what amount of hardship was undue. She listed:

. . . financial cost, disruption of a collective agreement, problems of morale of

120. Supra, fn. 4, at p. D/3107.
other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations.

...[t]his list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.\(^{21}\)

Continuing the analogy between \textit{b}f\textit{or} and \textit{b}f\textit{j} Sopinka J.'s comments in \textit{Renaud} should be read, \textit{mutatis mutandis}, as relevant to the \textit{b}f\textit{j}. He said:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

... The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.\(^{12}\)

Sopinka J. had previously noted, with respect to the impact of an accommodation on other employees, that

... more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures.

... Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business.

... The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. ... It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.\(^{123}\)

\(^{121}\) \textit{Supra}, fn. 76, at p. D/438.


The only two jurisdictions which include a list of factors to consider in assessing reasonable accommodation in their human rights legislation are Ontario and the Yukon. Several sections of the Ontario *Human Rights Code* specify that a limiting factor will not be considered *bona fide* unless the person cannot be "accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any."\(^{124}\)

The Yukon *Human Rights Act* provides:

7. (1) Every person has a responsibility to make reasonable provisions in connection with employment, accommodations, and services for the special needs of others where those special needs arise from physical disability, but this duty does not exist where making the provisions would result in undue hardship.

(2) For the purposes of subsection (1) "undue hardship" shall be determined by balancing the advantages and disadvantages of the provisions by reference to factors such as

(i) safety
(ii) disruption to the public,
(iii) effect on contractual obligations,
(iv) financial cost,
(v) business efficiency.

Financial cost is one of the factors which should be considered in assessing undue hardship. In *Howard* the University entered evidence about total costs of providing sign language interpreters to students but "did not adduce any evidence to suggest that the operations of the University would be seriously affected if it provided the complainant with an interpreter" which was estimated to cost $40,000 per year. "There is no evidence to suggest the nature of its operation would fundamentally change or that it would cease to operate."\(^{125}\) "The respondent has failed to persuade me that accommodating the complainant by providing an interpreter, or funds for one, would constitute more than a minor interference with the operations of the University."\(^{126}\)

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124. For example, ss. 11(2), 17(2), and 24(2).
The human rights commissions in two jurisdictions, Canada and Ontario, have issued policies which outline how they intend to apply the concept of reasonable accommodation. Since the decision about how much accommodation is reasonable is so dependent on the facts of the particular circumstance all that the policies provide is a refinement of the broadly defined factors previously mentioned.

The policy of the Canadian Human Rights Commission, applicable to services, provides for three factors which must be considered in assessing whether a measure amounts to an undue hardship. These are: a) the "capacity of the supplier to absorb the cost or loss of revenue resulting from the measures taken, which are not offset by increases of productivity, avoidance of penalties, tax exemptions, grants or subsides or other gains; b) the extent to which any inconvenience would prevent the supplier from carrying on the essence of its undertaking; and, c) the scope of the demands made by the measure on other customers or on the supplier's employees." \(^{127}\)

The Ontario Human Rights Commission guidelines, applicable to employment and services, are more detailed. "Undue hardship will be shown to exist if the financial costs that are demonstrably attributable to the accommodation of the needs of the individual with a disability, and/or the group of which the person with a disability is a member, would alter the essential nature or would substantially affect the viability of the enterprise. ." . Financial cost includes capital and operating costs and "the cost of additional staff time, beyond what can be accomplished through restructuring existing resources and job descriptions" and "any other quantifiable and demonstrably related costs." Costs will be assessed in relation to the respondent's ability to recover the costs in the normal course of business, the availability of grants, subsidies, and loans, the ability of the respondent to distribute the costs throughout its whole operation and amortize or depreciate capital costs, and the benefits derived from tax deductions, improved productivity, increased

resale value of property, and any increase in clientele. Undue hardship will be found if, after appropriate accommodations have been made, the degree of risk still outweighs "the benefits of enhancing equality for disabled persons." Where an accommodation may be an undue hardship if implemented immediately the guidelines propose that accommodation may be required to be phased in over time or the respondent may have to establish a "reserve fund" to finance the accommodation over a longer period. In either of these circumstances interim accommodation may be required. However, the preference is for immediate accommodation with the costs being paid over time through loans, debentures, or other financing arrangements.\(^\text{128}\) These guidelines are somewhat optimistic!

Reasonable accommodation short of undue hardship is a very subjective concept. What is reasonable and what is undue are matters of individual judgement primarily influenced by how much one wants to accommodate differences. In terms of accessibility rights it is noted that cost is always one of the factors to be considered. Although in fact a great deal can be done to improve accessibility without much cost, making substantial modifications to existing buildings and equipment does cost. In the current economic climate cost is a major concern of governments and private industry. In the absence of legislative or judicial pronouncements, how this affects accessibility rights is uncertain. Most of the activity in the area of accessibility rights is taking place at the political level with various actors involved in numerous public and private projects to improve accessibility.

iii. Specific Legislative Limitations:

Two provinces explicitly protect the owners and occupiers of buildings from claims

\(^{128}\) Guidelines for Assessing Accommodation Requirements for Persons with Disability.
of discrimination if the building meets the requirements of the building code. The Alberta Individual Rights Protection Act provides that no one shall be found liable for discrimination because of disability by reason only that a building is inaccessible if that building meets the requirements of the Uniform Building Standards Act.\(^\text{129}\)

The Yukon Human Rights Act does not apply to structures which comply with the Building Standards Act and which existed at the time the Act came into force.\(^\text{130}\)

Canada and Quebec have special provisions which limit the right to file complaints about access. The Canadian Human Rights Act allows the Canadian Human Rights Commission to approve plans for the adaptation of services to meet the needs of disabled people. Once approved, matters covered by those plans do not constitute a basis for complaint relating to accessibility based on disability.\(^\text{131}\)

In Québec, An Act to Secure the Handicapped in the Exercise of their Rights requires certain public transport and telephone companies to submit "development programmes" to provide public transportation and telephones for disabled people to the government for approval. Where the entity conforms to the programme no complaint may be filed under the Québec Charter. This Act does not intend to specify any requirement for integration. It only requires plans for providing the service in some manner. In practice, in the area of transportation, it is the legislation used to establish handitransit systems. The owners of certain buildings, to be prescribed annually by regulation, must submit to the government "development programmes" for making the buildings accessible. The government may also, by regulation, exempt categories of

\(^{129}\) S. 5 Notwithstanding section 1, no person who is the owner of, or is responsible for the use, occupancy, construction or alteration of, a building as defined in the Uniform Building Standards Act shall, by reason only of the condition of the building, be found to have contravened section 3 or 4 as it relates to denial or discrimination on the basis of physical disability if he establishes that the building complies with the applicable requirements of that Act and the regulations under that Act. R.S.A. 1980, c.I-2.

\(^{130}\) S. 7 (3) This Act does not apply to structures which at the commencement of this Act were existing and complied with the applicable requirements of the Building Standards Act and regulations under that Act. S.Y. 1987, c. 3.

\(^{131}\) Supra, chapter IV, fn. 72.
buildings from the Act and even exempt individual buildings where it believes that accessibility is not worth the cost.\textsuperscript{132}

G. Remedies Under Human Rights Legislation:

i. Statutory Powers of Remedy:

\textsuperscript{132} S. 67. Every public transport company must, within the year following 2 April 1979, submit for approval to the Minister of Transport a development programme for the purpose of providing, within a reasonable delay, public transportation for the handicapped within the territory served by it.

Such programme may take account of the rate of equipment replacement and the nature of the services offered.

After approving a programme, the Minister of Transport shall see to it that it is complied with and carried out.

S. 68. The Régie des télécommunications shall see to it that every development programme, approved or modified by the Régie des services publics, for the purpose of providing to the handicapped access to telecommunications is complied with and carried out.

S. 69. Every owner of an immovable subject to the Public Buildings Safety Act (chapter S-3) or to the Act respecting occupational health and safety (chapter S-2.1) and not subject to the Building Code (Order in Council 3326, 29 September 1976) must present to the Minister of Housing and Consumer Protection a development programme for the purpose of providing the accessibility of his immovable to handicapped persons.

The Minister of Housing and Consumer Protection may by regulation, determine the groups of immovables that will be contemplated by this section each year and the standards of accessibility to which their owners must conform.

The owner of an immovable must present his development plan within one year from the time his immovable is contemplated by such a regulation.

S. 70. Notwithstanding the right granted by section 10 of the Charter of human rights and freedoms (chapter C-12), the Government may, by regulation, exempt certain types or classes of immovables from the application of section 69.

The Minister of Housing and Consumer protection may also, where he considers that the costs of the alterations to be made to the immovable and the nature of the services offered therein do not justify the providing of accessibility thereto to handicapped person, exempt such immovable from the application of section 69.

S. 72. Notwithstanding the right granted by section 8 of the Charter of human rights and freedoms, no handicapped person may, in the year following the coming into force of sections 67 and 68, allege discrimination based on the sole fact that the means of transportation and of the telephone services are not accessible for him and, after the expiration of such delay, the handicapped person shall not do so if the public transport company or the telephone undertaking conforms to the development programme approved pursuant to section 67 or 68. S.Q. c. E-20.1.
The remedial powers of a human rights administrative agency are limited to the powers provided by the empowering statute: "An administrative tribunal may not exceed the jurisdiction it has by statute." The two basic principles upon which human rights remedies are based are 1) that the victim should be returned to the position he/she would have been in but for the discriminatory act, and 2) that the same discriminatory action be prevented from occurring in the future.

The statutory provisions setting out the remedial powers of human rights tribunals and boards of inquiry vary greatly in their complexity. For example, the Canadian Human Rights Act provides detailed provisions on the remedial powers of a Tribunal including the issuing of an order to cease the contravention and take action to prevent a reoccurrence in the future by adopting a special program or an adaptation plan, make the lost right or opportunity available at the first opportunity, provide compensation for wages or other expenses, and order compensation in respect of injury to feelings or self-respect.

133. *Slaitght Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038, at p. 1079, *per* Lamer J. (as he then was), dissenting in part.

134. S. 53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including
  (i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
  (ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or
(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,
The Ontario *Human Rights Code* has a much more succinct description of a Board of Inquiry’s remedial powers. A Board is empowered to direct the party "to do anything that, in the opinion of the Board, the party ought to do" to comply with the Act, order compensation for any loss arising from the infringement, and order compensation for mental anguish.\(^\text{135}\)

As with the other parts of human rights statutes, the remedy sections should be read broadly in order to maximize their effectiveness in achieving the social purpose of the legislation. In *CN v. Canada (Canadian Human Rights Commission) [Action Travail de Femmes]* CN argued that a federal Human Rights Tribunal had exceeded its jurisdiction when it ordered a hiring quota as a special temporary remedy to a finding of systemic sex discrimination. The basis of the argument was that s. 53(2)(a) of the *Canadian Human Rights Act* allowed the imposition of a special program (affirmative action) only to "prevent" discrimination. Since the imposition of a hiring quota was a "cure" for a past discriminatory practice not a "prevention" of a future discriminatory practice the order respecting the quota was beyond the Tribunal’s jurisdiction. Chief Justice Dickson rejected this narrow and purely mechanistic interpretation in no uncertain terms. He said that the section was "designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups" and that "prevention' is a broad term and that it is often necessary to refer to historical patterns of discrimination in order

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\(^{135}\) S. 41(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

Subsection 41(2) contains special provisions allowing a Board of Inquiry to remain seized of a complaint of harassment and, after a further hearing, issue orders to require a person to take action to prevent a further repetition of the harassment.
to design appropriate strategies for the future.” 36 He went on to say:

When confronted with such a case of "systemic discrimination", it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met. In any programme of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed there is no prevention without some form of remedy.

... When the theoretical roots of employment equity programmes are exposed, it is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future. It is for this reason that the language of the Tribunal's Order for Special Temporary Measures may appear "remedial". In any case ... the important question is not whether the Tribunal's order tracked the precise wording of s. 41(2)(a) [now s. 53(2)(a)], but whether the actual measures ordered could be construed fairly to fall within the scope of the section. One should look to the substance of the order and not merely to its wording. 37

Robichaud v. Canada (Treasury Board) was an appeal against a federal Human Rights Review Tribunal’s imposition of liability on the Crown for sexual harassment committed by a supervisor. La Forest J., per curiam, rejected arguments that the foundation for employer liability under human rights law could be found in theories of vicarious liability arising from criminal or quasi-criminal conduct. He said:

These are completely beside the point as being fault oriented, for ... the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them.

... Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act ... is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.

... It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable

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136. Supra, fn. 5, at p. 1141.

137. Ibid, at pp. 1141-5.
However, the principles of tort law are applicable in determining the quantum of damages. The proper test for devising an individual remedy in human rights cases is the doctrine of *restitutio in integrum* taking into account remoteness or reasonable foreseeability.\(^\text{139}\)

In *Canada (Attorney-General) v. Morgan* Mr. Justice Marceau distinguished the right to compensation from the assessment of quantum. He noted that while the special nature of human rights legislation made it inappropriate to limit the right to compensation in accordance with the principles applicable to tort law it was appropriate to assess the damages which are recoverable according that law. One of those principles is that damages are not recoverable for consequences which are indirect or too remote from the action giving rise to liability. He said:

> I think one should not be too concerned by these various concepts in order to give effect to the simple idea that common sense required that some limits be placed upon liability for the consequences flowing from an act, absent maybe bad faith. Reference is made at times to foreseeable consequences, a test more appropriate, it seems to me, in contract law. At other times, standards such as direct consequences or reasonably closely connected consequences are mentioned. The idea is always that same: exclude consequences which appear down the chain of causality but are too remote in view of all the intervening facts. Whatever be the source of liability, common sense still applies.\(^\text{140}\)

As a general principle the fact of having been discriminated against gives rise to an award of money to compensate for that alone. This is separate from any award that may be made where the discriminatory action had been engaged in wilfully or recklessly. The principle that there should be an award of compensation for discrimination alone was

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thoroughly canvassed in *Cameron v. Nel-Gor Castle Nursing Home*¹⁴¹, a complaint of refusal to hire a nurses' aid because she had three deformed fingers on one hand. The Board of Inquiry stated that awards should provide true compensation to meet the policy objectives of the legislation and avoid trivializing or diminishing respect for the public policy enunciated by the legislation. An award of special or general compensation is not affected by the mental state of the respondent, with the exception of awards based on wilful or reckless disregard for the complainant's rights. The Board stated:

An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers.¹⁴²

The Board concluded that the legislation, by providing that "where the infringement has been engaged in wilfully or recklessly",¹⁴³ allows an award of punitive damages as well. However, the purpose of this type of award is not simply punitive but has as its object the encouragement of future compliance by the imposition of a deterrent, not a retributive, penalty.

In *Grant v. Wilcock* the Board of Inquiry stated:

Awards based on [injury to dignity, self-respect and for the loss of the right to freedom from discrimination] recognize that the very right to be free from unlawful discrimination has an intrinsic value.

... Awards should not be so minimal as to amount merely to a licence fee to discriminate, nor should they be punitive, unless punitive damages are called for because of wilful or reckless infringement of the Code.¹⁴⁴

Three jurisdictions have special remedial sections dealing with complaints about physical access to buildings. The *Canadian Human Rights Act* provides that if a Tribunal

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¹⁴¹. *Supra*, fn. 73, at pp. D/2196-2201.


finds that the premises in question require adaptation to meet the needs of the disabled complainant, it shall make an order for adaptation short of undue hardship and if no such order can be made then it shall make appropriate recommendations.\textsuperscript{145}

A similar provision appears in the Saskatchewan and Manitoba legislation. Section 31(9) of the Saskatchewan \textit{Code} provides that where the \textit{Code} has been violated because a facility is not physically accessible, the Board of Inquiry "shall make an order so indicating and include in the order any recommendations that it considers appropriate" but (s. 31(9.1)) if providing access would be an undue hardship the Board shall not make an order for remedy under s. 31(7).

Subsection 43(4) of the Manitoba \textit{Code} provides that where there has been a violation because a facility is not physically accessible, the Board of Inquiry may make "recommendations" for remedying the situation, but where the respondent shows the cost of making alterations so as to allow access would be an undue hardship the Board shall make no "order" under s. 43(2)(a) or (e).

These sections have a very limited role. Lack of access is an indirect type of discrimination. Matters of cost are considered in the assessment of the defence that no reasonable accommodation was possible without undue hardship. That would be a full defence to the complaint and no remedy would be called for. It is possible for an employer or service provider to directly discriminate against a person and also have inaccessible facilities. In those situations where it would be appropriate to order the provision of the lost benefit these sections introduce cost factors to the remedy.

\textsuperscript{145} S. 53(4)If, at the conclusion of its inquiry into a complaint regarding discrimination based on a disability, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such a disability, the Tribunal shall

(a) make such order pursuant to this section for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or

(b) if the Tribunal considers that no such order can be made, make such recommendations as it considers appropriate, and, in the event of such finding, the Tribunal shall not make an order unless required by this subsection.
The statutory remedial powers granted to human rights boards are very wide ranging and provide substantial remedies for violations of the rights protected. In addition to providing individual compensation for actual losses suffered and compensation for the denial of the right to be free from discrimination itself, the courts have emphasized the requirement to take action to prevent repetitions of the denial. In this way, as well as vindication and compensation for the individual, the public policy element principles of the legislation can be furthered by individual complaints.

ii. Dealing with Discriminatory Legislation

It is increasingly common for human rights commissions to be asked to deal with discrimination which arises from the provisions of other legislation. Examples of legislation affecting accessibility rights are the various provisions dealing with airline tariffs and safety. It is arguable that this issue should really be discussed in the context of defences to allegations of discrimination, particularly whether reliance on other legislation should be considered in the bfor or bjf analysis. I include it in this section on remedies because the early practice of the Canadian Human Rights Commission was to dismiss such complaints not because the legislation would have been a potentially valid defence but because it was thought human rights tribunals did not have the power to impose a remedy in the face of requirements of other legislation.146 I also include it here because the scope of any power to deal with other legislation raises questions about the remedial

146. This belief was based on Bailey v. Cummings (1980) 1 C.H.R.R. D/193 (Fed. Tribunal). The Tribunal found that the different treatment between taxpayers based on marital status was discriminatory but, applying traditional rules of statutory interpretation, found no conflict between the Canadian Human Rights Act and the Income Tax Act. The Tribunal dismissed the complaints because it found that it was within the authority of Parliament to make the distinctions it made. The Tribunal noted that a different result could easily have been reached had the Income Tax Act been challenged under a constitutional instrument. In obiter, the Tribunal said it did not have the power to alter the Income Tax Act or its effect.
powers of administrative tribunals. Included here are considerations of whether the tribunal has the power to, in effect, sever discriminatory parts of legislation and the power to read words into other legislation to preserve rights granted by the legislation while eliminating its discriminatory aspect. Without that power tribunals will often find they have to let the discrimination continue to preserve the other rights. This type of authority is well beyond anything administrative tribunals could claim under the traditional rules of administrative law. If tribunals have this power it is to be found through the application of the Charter. The ability of administrative tribunals to apply the Charter is thus relevant in both the substantive and remedial contexts.

The relationship between human rights and other legislation will be considered from three perspectives: specific statutory provisions, the doctrine of implied repeal, and the Charter.

In many provinces the human rights legislation specifies that it has primacy over all other legislation unless specifically exempted. These primacy clauses deal with any arguments about theories of implied repeal when legislation conflicts with the human rights legislation. Still, the question about the power of Boards of Inquiry to read words into legislation to preserve existing benefits while eliminating discriminatory aspects of the other legislation remains unanswered.

The leading case on implied repeal in the human rights context is Winnipeg School Division No. 1 v. Craton. In this case the Manitoba Public Schools Act, 1980 specified that teachers may be mandatorily retired at age 65. Craton did not want to retire. She sought and obtained a declaration in the Court of Queen's Bench that the provision in the collective agreement enforcing mandatory retirement was invalid as it violated the Manitoba Human Rights Act prohibition of age discrimination. The offending section of the Public Schools Act, 1980 was a simple re-enactment in a consolidating statute of the same section first passed before the Human Rights Act. McIntyre J. said

Human rights legislation is of a special nature and declares public policy regarding
matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims. In this case it cannot be said that s. 50 of the 1980 consolidation is a sufficiently express indication of a legislative intent to create an exception to the provisions of s. 6(1) of The Human Rights Act. 147

The rule regarding implied repeal was described by Mr. Justice Mahoney in Canada (Attorney General) v. Druken in these words:

The rule appears to be that when human rights legislation and other legislation cannot stand together, a subsequent inconsistent enactment, unless clearly stated to create an exception to it, is not to be construed as repealing the subsisting human rights legislation. On the other hand, when the human rights legislation is the subsequent enactment, it does repeal by implication the other inconsistent legislation. 148

Druken dealt with a claim that a section of the Unemployment Insurance Act discriminated against persons on the basis of marital and family status where it disallowed participation in the program by persons who worked for their spouses or for companies substantially owned by their spouses. Druken was decided on the doctrine of implied repeal. The Human Rights Tribunal determined that impugned provisions of the Act violated the complaints’ rights and ordered the Unemployment Insurance Commission to pay the benefits denied.

Moreover, the Canada Employment and Immigration Commission was ordered not to enforce the provisions against other people in the future. The Attorney General argued that just as an administrative tribunal has no power to issue declarations of invalidity it has no power to order that legislation not be applied in the future. On this point Mahoney J. held:

The Attorney General proceeded from the position that a tribunal has no power to make a general declaration of invalidity to the proposition that a tribunal has no right to order that legislation, which it has found unjustifiably discriminatory

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in its necessary application, is not to be further applied. The argument would be no different had the offending legislation been found implicitly repealed. In my view, such a limitation on a tribunal’s power to make an order is inconsistent with paragraph 41(2)(a) of the Human Rights Act which expressly authorizes the tribunal to order that measures be taken "in order to prevent the same or a similar practice from occurring in the future". That is not intended only to prevent repetition of the discriminatory practice vis a vis the particular complainant; it is intended to prevent its repetition at all by the person found to have engaged in it. Thus the order that the CEIC cease applying paragraphs 3(2)(c) and 4(3)(d) of the U.I. Act and 14(a) of the U.I. Regulations appears entirely apt.\(^49\)

Human rights administrative tribunals may have to resort to the *Charter* if their enabling legislation does not provide suitable remedial powers or where it is necessary to cure a *Charter* violation within their own legislation before they can gain jurisdiction. To what extent may these tribunals apply the *Charter* when deciding the substantive issue and apply the principles which the courts use when they devise a remedy under the *Charter*? According to Professor Evans, every statutory administrative tribunal has the jurisdiction to decide any question of fact or law necessary to deal with the case before it including the interpretation of its enabling statute, the common law, and other legislation of general application. A tribunal has the power to determine the validity of any subordinate legislation applicable to the dispute. And, with the exception of a challenge to the entire enabling statute (which by definition is a challenge to the tribunal’s very existence), a tribunal may entertain a challenge to provisions within its enabling statute. In a non-Charter context this is usually a question of the application of the statute to the particular case. It is clear that a tribunal may decide division of powers constitutional questions to determine whether it has jurisdiction over the parties. Each of these general statements may be altered by an express or necessarily implied provision of the enabling statute.\(^50\)

The authority of administrative tribunals to apply the *Charter* has been dealt with by the Supreme Court of Canada in a trilogy of cases.

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In *Douglas/Kwantlen Faculty Assn. v. Douglas College*\(^{151}\) the Supreme Court of Canada dealt with the question of the power of an arbitrator to apply the Charter to the terms of a collective agreement.\(^{152}\) Two faculty members had grieved their mandatory retirement pursuant to the terms of the collective agreement and an arbitrator was appointed. The collective agreement provided that an arbitrator would have all the powers granted an arbitrator by the terms of the British Columbia *Industrial Relations Act*\(^{153}\) (at the relevant times called the *Labour Code*). These powers include "the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement. . ." including the authority to

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\text{... interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, notwithstanding that its provisions conflict with the terms of the collective agreement.}
\]

La Forest J. said:

The predominant position among the courts is that in the exercise of its statutory mandate, a tribunal is empowered to examine and rule upon the constitutional validity of a statute it is called upon to apply.\(^{154}\)

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\text{...}
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Section 52(1) of the *Constitution Act, 1982* provides that any law that is inconsistent with the provisions of the Constitution of Canada - the supreme law of the land - is, to the extent of its inconsistency, of no force or effect. A tribunal must respect the Constitution so that if it finds invalid a law it is called upon to apply, it is bound to treat it as having no force or effect.\(^{155}\)

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\text{... [T]he jurisdiction of a statutory tribunal must be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought. In the exercise of that jurisdiction, it can in the exercise of its mandate find a statute invalid under the Charter.}^{156}\]

\[151. \text{[1990]} 3 \text{S.C.R. 570, 13 C.H.R.R. D/403.}\]

\[152. \text{The Supreme Court of Canada agreed with the arbitrator's conclusion that the employer, a community college, was a creation of government and was bound by the Charter. As distinguished from universities the community college was a creation of government to implement government policy. It was thus subject to the Charter. The terms of the collective agreement in this context were a law for the purposes of s. 15(1).}\]

\[153. \text{R.S.B.C. 1979, c. 212, Part VI.}\]

\[154. \text{Supra, fn. 151, at p. D/416.}\]

\[155. \text{Ibid, at p. D/418.}\]

\[156. \text{Ibid, at p. D/419.}\]
However, a tribunal cannot give a formal declaration of invalidity, a power reserved to the superior courts, and the tribunal's deliberations will be given no curial deference on judicial review.

La Forest J. reviewed the extensive literature debating the advantages and disadvantages of administrative tribunals applying constitutional norms to their decisions. Among the disadvantages are that not all tribunals are of the same calibre, they are not necessarily as independent as the courts, the relevant and necessary evidence may not be before the tribunal, and frequently the Attorneys-General are unavailable to represent the public interest. In addition, there is concern that deciding Charter issues would militate against the informal process of administrative agencies, the simplified rules of evidence, and the need for speedy decisions. However, La Forest J. concluded that the advantages outweighed the disadvantages. The advantages he canvassed were as follows:

First and foremost, of course, is that the Constitution must be respected. The citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution.

There are clear advantages to presenting these issues to the tribunal. The issue may be raised at an early stage in the context in which it arises without the citizen having first to resort to another body, a court which will often be more expensive and time-consuming.

There are, as well, clear advantages for the decision making process in allowing the simple, speedy, and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court. It is important, in this as in other issues, to have the advantage of the expertise of the arbitrator or agency. That specialized competence can be of invaluable assistance in constitutional interpretation.

...[I]n the case of statutes capable of alternative interpretations, some of which raise and some which do not raise constitutional problems, it is extremely important that judicial appraisal of the various possibilities not be conducted in a vacuum. The informed view of the tribunal is invaluable here. And, from the standpoint of agency processes themselves, I think it important that those called upon to make governmental decisions focus on the values enshrined in the


The next case, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, dealt with the power of the Labour Relations Board to apply the Charter to its enabling legislation. At issue was whether employees of a chicken hatchery were agricultural employees and, if so, whether their exclusion by the terms of the Act was unconstitutional as a violation of the freedom of association. If the section violated the Charter the jurisdiction of the Labour Board would have been expanded. The legislation establishing the Labour Relations Board contained a privative clause giving it "exclusive jurisdiction" to "determine all questions of fact or law" arising from the matters before it. La Forest J. confirmed the approach set out in *Douglas College*. Section 52(1) of the *Constitution* does not in itself confer jurisdiction on an administrative board: "Rather jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. . . . [A] tribunal . . . must already have jurisdiction over the whole of matter before it, namely, the parties, subject-matter and remedy sought." LaForest J. noted that the legislation expressly provided that the Board should determine all issues of fact or law. In addition, he reiterated the practical rationale expressed in *Douglas College*. He noted that labour boards are "administrative bodies of high calibre" which apply a recognized body of jurisprudence.

In the third case, *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, an applicant was refused unemployment insurance benefits because she was over the age of 65. The legislation then in force exempted workers over age 65 from paying contributions of receiving benefits. Instead, workers received a single lump sum special benefit upon reaching age 65 whether they continued working or not.

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The *Unemployment Insurance Act* is administered by staff employees. Disputed claims may be appealed to the Board of Referees and further appealed to an Umpire. The Court held that the Board of Referees did not have the jurisdiction to decide a *Charter* challenge that the benefits provisions violated s. 15 of the *Charter* based on age.

The Court considered the entire statutory scheme. It held that the express mandate given by the legislation will be the most important factor. Where no clearly expressed mandate is given other factors will be considered. In this scheme the legislature expressly provided the Umpire with jurisdiction to determine all necessary questions of fact or law. The absence of such jurisdiction in reference to the Board of Referees was unlikely to have been a mere legislative oversight and the court refused to imply such jurisdiction had been given to the Board.

The result of these decisions is that an administrative tribunal may have the power to apply the *Charter* to its enabling legislation depending on the nature of the legislative scheme. Human rights legislation proscribes certain types of discrimination and it establishes special comprehensive administrative enforcement schemes. Human Rights Tribunals are designed to provide the initial forum for making determinations of fact and law relative to complaints of discrimination. Unlike the labour relations schemes no human rights legislation specifically provides a board of inquiry with the power to determine "all questions of fact or law that arise in any matter" before it. Also no legislation contains a privative clause, although some acts limit appeals to issues of law only. Despite these differences from labour boards the courts have recognized that human rights tribunals are specialized administrative agencies which will be accorded a certain amount of deference in matters considered directly within their specialized province. It is most likely that they will be recognized as agencies which can apply the *Charter* to their

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deliberations.\textsuperscript{164}

The trilogy of cases all dealt with situations in which the discrimination could be cured by severance. In cases of underinclusive legislation severance will not be effective in providing a substantive remedy. In \textit{Schachter v. Canada}\textsuperscript{165} the Supreme Court of Canada dealt with the powers of the courts to cure discrimination caused by underinclusive legislation. In short, the Court held that both severance and reading in are available remedies under appropriate circumstances. Given the practical reasons supporting the use of the \textit{Charter} by administrative agencies as described in \textit{Douglas College}, it seems to me that the remedies of severance and reading in should both be available to human rights boards of inquiry.

\textbf{H. Criticism of the Enforcement Model:}

A large number of people have obtained individual redress for being discriminated against because of their race, sex, disability, or other prohibited ground of discrimination. Thousands more have benefited from changes resulting from individual complaints. The influence human rights complaints have had on the actions of respondent entities and the individuals working for those entities varies depending on the subject matter. Significant changes in policies which were overtly discriminatory on the basis of, for example, race, sex, and disability have occurred.

Commissions have been less successful in dealing with situations where particular combinations of practices subtly perpetuate racism or sexism in a workplace. Employment equity legislation is a recognition that the current enforcement model is unsuitable for dealing with this type of systemic discrimination. In addition, human rights

\textsuperscript{164} In \textit{Bell and Cooper v. Canadian Human Rights Commission}, F.C.A., April, 1994, unreported, Marceau J., concurring for different reasons, held that neither the CHRC nor a federal Tribunal had the jurisdiction to apply the \textit{Charter} when making their decisions.

legislation has had a significant political influence. Changes to eliminate discriminatory practices are occurring because decision makers, on their own initiative or because of pressure brought to bear by advocacy groups, are responding to the public policy principles embodied in the legislation.

There are two aspects of the human rights enforcement model which are particularly problematic for the enforcement of accessibility rights. These are the need for a complaint about a particular act of discrimination and the mediation/conciliation principle which lies at the heart of the enforcement scheme.

One of the primary reasons for enforcing human rights legislation by a commission and not through the courts is to give individual victims of discrimination a specialized redress mechanism which was quick and knowledgable about the dynamics of discrimination. Enforcement is reactive: it begins with an individual or organization filing a complaint. 166

Although the enforcement model was designed to overcome the hesitation of victims of discrimination to use the courts, the fact is most victims of discrimination do not file complaints. Why this is so has not been systematically studied but it is well known that the majority of people who believe themselves to have been discriminated against do not file complaints or even contact a human rights commission. This is just as well because, if even a sizable minority of people who believe themselves to have been the victims of discrimination did call, the commissions would effectively be shut down by the volume of calls. A complaint driven model means that the work of the commissions is directed by the chance combination of complaints that arrive at the door. The commissions cannot develop strategic enforcement plans to maximize the effectiveness of their efforts. It is a common lament of commissions that they know they are not dealing effectively with systemic discrimination but cannot do so because of the work load of

166. Although most statutes give the commissions the power to initiate complaints this power has essentially never been exercised.
dealing with individual complaints.

Governments will not give commissions any substantial increase in funding. If commissions are to maximize their efficiency the legislation will have to be changed to give the commissions much greater power to control their caseloads. In practice this will require giving the commissions much greater discretion to simply refuse to deal with individual complaints. Commissions already have the power to refuse to deal with complaints which are trivial or vexatious or where a potential complainant does not provide sufficient reasonable grounds to file a complaint but they are very hesitant to use these powers. They need a clear legislative mandate to control their workload. That the commission would not help some people who had felt victimized is a "tragic choice" but other activities could benefit more people. To mitigate the unfairness of this proposal to individuals, I would also change the legislation to allow an individual to pursue the issue in the courts without the involvement of the commission. This would be an alternative for some but not of much realistic use for the poor and marginalized who cannot afford a lawyer or do not trust the legal system to protect their rights.

In most jurisdictions, the complainant does not have to be the victim of the discriminatory act but an actual victim must be willing to be involved and willing to take part in a Board of Inquiry if that is necessary. This is a practical demand because without a victim a complaint is moot. However, the fact that no one complains about an inaccessible building does not necessarily mean no one who wanted to enter had to turn away. People are often so put off by the lack of access that they do not bother trying to get in. Many people are marginalized in various ways and the notion that they may complain is not realistic to them. The lack of access does not mean there is no victim.

167. See text accompanying fn. 42 in Chapter II.
168. See text accompanying fn. 157 in chapter VI.
169. Under the Canadian Human Rights Act, s. 40, a complaint dealing with services cannot be filed without an actual victim of discrimination being identifiable.
(although it might reflect the importance of access to that building). Even in the absence of a complainant, whether because to date there has been no victim or people have not bothered to file a complaint, it does not advance the principles of human rights legislation to have some entities simply ignoring the requirements of the legislation.

The need for a victim of discrimination also means that a complaint cannot be filed before a building is built. Furthermore, as a practical matter, it is unusual for anyone outside the architect’s office to be in a position to know that a building is being designed without properly implementing accessibility rights. Apart from educating the relevant professions, which is not done in any consistent manner, human rights commissions have no process to prevent inaccessible buildings from being built. Once the building is complete then the _bif_ defence is available to argue that renovations would be too expensive. (In Alberta and the Yukon no complaint can be filed dealing with accessibility rights if the building met the Building Code requirements at the time it was built. Since building codes are often insufficient to ensure accessibility rights are fully implemented this is a serious limitation on these Commissions.) How cost will be factored into the _bif_ defence is unknown at this time since there is almost no jurisprudence discussing it. My guess is that the courts will avoid openly dismissing complaints on the basis that the costs of remedy are too high but I think that will be a considerable unstated factor.\(^{170}\) This reactive role for the commissions applies equally to any other accessibility issue. For example, a complaint could not be filed that a new line of buses is not designed to be accessible. If those are the only buses on the market a particular bus company could not be ordered to buy only accessible buses. To expect an individual company to develop its own bus would be too costly to survive the _bif_ defence.

Complaints are filed by individuals in relation to particular incidents. Class action suits are not used in Canada. A remedy can be devised only for the discriminatory act

\(^{170}\) In passing, I think the requirements for calculating cost in the Ontario Human Rights Commission Guidelines, see text accompanying fn. 128, are unrealistic.
alleged in the complaint form. This reduces the effectiveness of the process. For example, in *Huck* a remedy was devised for the particular theatre. The respondent was ordered to renovate the theatre so that a set number of spaces were made available for wheelchairs in the main seating area. New theatres are more and more often designed to provide a similar seating option but other theatres, the majority of the capital stock of the industry, have made no changes.

Despite the efforts of human rights commissions to make the process user friendly, it is not. Disabled people and members of other protected groups have severely criticized the human rights process and commission personnel. In all cases a complaint is a long drawn out process which frequently ends in a general feeling of unhappiness and dissatisfaction. A report on the experiences of complainants filing complaints of disability discrimination with human rights commissions revealed a high level of dissatisfaction. This dissatisfaction has been caused by feelings of frustration with the process caused by the length of time it takes, staff handling of complaints both in terms of empathy with complainants and understanding the issues raised. Inadequately trained staff and frequent turnover added to feelings that the commissions were not really competent to handle the complaints. Disabled consumer groups also expressed concerns about the independence and equality expertise of the appointees to the commissions and boards of inquiry because of a perception that the appointments had a large element of political patronage.

Stephen Percy has explained how the lack of a clearly stated equality theory in the United States delayed implementation of the policy change reflected in s. 504 of the *Rehabilitation Act*. Even less guidance has been given by Canadian legislators. Furthermore, the human rights commission model contributes to the absence of policy

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173. See text accompanying fn. 32 in chapter III.
In the human rights enforcement model commission staff try to conciliate complaints to reach a settlement without the appointment of a board of inquiry. In some jurisdictions conciliation efforts are made before the Commission makes any formal determination on the merits of the complaint and in others it occurs after a preliminary determination on the merits. And about half of all complaints are dismissed at an administrative level. These dismissals are as important as the settlements to determining what the requirements for accessibility rights are. This enforcement model, based as it is on the principle that conciliated settlements are very strongly encouraged, is premised on the privacy of the parties. Until a board of inquiry is convened there is a perception that the complainant and respondent are entitled to keep the complaint secret. Some commissions read the confidentiality requirements of their legislation so strictly that they do not even acknowledge the existence of particular complaints.

In cases of both dismissal and settlement there are no reports setting out the principles and precedents which support the outcome of a complaint. There is no requirement for commissions to issue reasoned judgements for their decisions and no methodical collection of these cases. Commission decisions have all the appearance of ad hoc responses to particular fact situations. Since the bulk of complaints are handled in this way it is impossible to figure out the principles which are being applied so that the public can understand the principles which inform accessibility rights. The failure to

174. One may note the current argument about whether sexual harassment complainants benefit from keeping a complaint quiet to try and work out a settlement or they benefit from making the complaint public and bringing the problem into the open. The Canadian Human Rights Commission is the only one which regularly issues press releases about the occasional conciliated settlements, after obtaining the agreement of the parties.

175. For example, the Manitoba Human Rights Commission has always strictly interpreted their legislation. The Commissioners over the years have made conscious policy decisions that they will not even try to read their legislation in a way which would allow them to communicate the results of complaints to the public.

176. The investigation reports are simply recitations of the facts found in the investigation. They do not include a reasoned argument relating the facts to the legislation and precedents.
assemble this information in a systematic way means that policy development occurs in a factual vacuum.

Since the only guidance for analyzing accessibility issues is the broadly stated \textit{bfi} guidelines and general principles of integration and accommodation neither respondents nor human rights investigators have an analytical model against which to assess the facts presented by each situation. This means that the human rights process becomes, in Percy's words, a new arena for policy debate. Because human rights complaints are processed on a private conflict resolution model a complaint is not an effective venue in which to conduct basic policy arguments. Since both sides are developing their responses in the absence of precedents or a detailed theoretical model the processing of these complaints is subject to inordinate delay.

I. Conclusions:

Human rights legislation is remedial and as such is to be given a broad and liberal interpretation to advance the mischief it is designed to combat. It has taken on a quasi-constitutional status which gives it paramountcy when conflict arises with other legislation. As a corollary to the purposive interpretation of the rights it guarantees the defences are to be read narrowly. The relationship between the apparent emphasis on the right to be treated as an individual and not be subject to stereotyping and group classification, and the exceptions which allow affirmative action based on group characteristics, has not yet been thoroughly explored in the jurisprudence. However, there is no conflict between the group and individual interest of disabled people in having a fully accessible environment and the rights of others.

Discrimination will be found in cases of intentional adverse treatment because of bias, adverse differential treatment which is not explained by a legitimate non-discriminatory reason, and the application of facially neutral rules or policies which
adversely affect individuals because of their membership in a protected group. The concept of adverse effect discrimination is key to enforcing accessibility rights. The presence of a barrier such as steps, provision of telephones in call boxes too high off the ground, or the use of standard, off the assembly line inaccessible buses are all examples of adverse effect discrimination.

The various statutory definitions of "disability" are all broad enough to encompass any long term medically recognized condition. The concept of discrimination because of disability includes two different group interests. There is the individual interest in not being adversely treated because of a real or perceived physical or mental condition and a group interest in overcoming the social and economic disadvantage experienced by many disabled people. This issue becomes most relevant when designing affirmative action programs so that the benefits go to disabled people who have traditionally experienced significant employment discrimination. For accessibility rights the definitions are all sufficiently broad that they include everyone who experiences accessibility barriers.

Private, quasi-government, and government entities which provide goods, services and facilities to the public may not discriminate. It is recognized that these entities often place restrictions on who can use their services or benefit from their programs. The application on non-discriminatory criteria to select which portions of the greater public may benefit from the service does not negate the essentially public nature of the service.

The rights guaranteed by these statutes are limited by general and specific exceptions. A general limitation in the form of a "bona fide occupational requirement" exception for employment and a "bona fide justification" exception for services applies to cases of direct discrimination, and a general limitation in the form of a "duty to accommodate short of undue hardship" applies to cases of adverse effect discrimination. Since there is very little jurisprudence on the subject dealing with services, the

177. In those jurisdictions with no specific legislative limitations the courts will read in an implied one.
interpretation of these exceptions must be done by extrapolation from the employment jurisprudence.

To prove the existence of a *bfj* a respondent must show that the policy was imposed in good faith and the sincerely held belief it was necessary to achieve a legitimate objective. In addition, the rule must be reasonably necessary to achieve the objective. This requires showing that the rule is rationally connected to the objective, that it does not place an undue burden on those to whom the rule applies, and that there is no reasonable alternative way to achieve the same objective without a, or with less, discriminatory impact. Once a *bfj* is demonstrated there is no need to reasonably accommodate individuals who cannot meet the requirement unless the applicable legislation has imposed such a requirement.

In cases of adverse effect discrimination the respondent has a duty to reasonably accommodate short of undue hardship. The scope of reasonable accommodation is inherently indefinite. What is reasonable depends on all the circumstances of a particular situation. Some of the factors to consider include financial cost, disruption of a collective agreement, the size of the entity, the inter-changeability of the workforce, and the life expectancy of the building in question.

There are numerous specific limitations in the statutes. Of particular relevance to accessibility rights, in Alberta and the Yukon no one may be found liable for discrimination because a building is not accessible if that building met the requirements of the building code in force at the time of construction.

The remedial powers of boards of inquiry are wide ranging and substantial. In each case the remedies will be designed to compensate the individual victim and prevent a reoccurrence of the discriminatory act. While it is most likely that boards of inquiry will be able to apply the *Charter* and its remedial powers to cases before them, this question is still not settled.

The effectiveness of human rights legislation is affected by factors inherent to this
enforcement model and by a lack of clear policy direction in relation to accessibility rights. The statutory scheme is based on complaints by victims. This reactive model is inefficient because commission workload is controlled by the nature of the complaints that are filed, the commissions cannot direct their efforts to a strategic enforcement plan, and the system does not require the development of a body of precedent to guide policy development.

The *Charter of Rights and Freedoms* has had a significant impact on human rights legislation. It was because of the *Charter* that many provinces amended their human rights legislation to provide greater protection for disabled people, particularly by including mental disability as a prohibited ground of discrimination. In the next chapter I will outline the general principles for interpreting the *Charter* especially in the context of s. 15, the equality rights section.
VI. THE CHARTER OF RIGHTS AND FREEDOMS:

The Charter of Rights and Freedoms sets out certain values upon which the relationship between government and the people is to be based. For the purposes of advancing the interests of disabled people section 15, the equality rights section, is the most relevant. My discussion of the Charter in this chapter will, therefore, be focused on that section.

My consideration of the Charter will include a review of the general principles of interpretation of the Charter and, in particular, section 15 and section 1, which permits inequality which can be "demonstrably justified in a free and democratic society". Since the Charter only applies to government I will review the difficult problem of defining the scope of government. This issue is particularly important because many claims of discrimination against disabled people arise from activities undertaken (or not undertaken) by hospitals, personal care institutions, transportation companies, and other agencies which are not self-evidently part of government but which, nevertheless, are implementing aspects of the governments' public policy in relation to disabled people.

Most claims of discrimination by disabled people require remedies far beyond merely striking down a discriminatory law. Since the effectiveness of the Charter in promoting equality for disabled people will, to a great extent, depend on the remedial powers of the courts, I briefly overview these remedial powers. The matter of most interest is the extent to which the courts may alter legislation to preserve benefits established by legislation which is found to be inconsistent with the Charter while at the same time providing an adequate remedy for any discriminatory effects of that legislation. I conclude this chapter with a short discussion on the relationship between human rights legislation and the Charter and the factors which influence a decision to use the human

rights processes or the courts to pursue a claim of discrimination.

Before reviewing the doctrinal aspects of the interpretation of the Charter it is worth considering some underlying themes which both empower and constrain the judiciary when it reviews decisions of legislatures and governments. The courts' power is lodged in the institution of judicial review which is firmly entrenched by constitutional convention and the clear language of the Constitution. However, the proper scope of judicial review remains a matter of controversy and fashion.²

In traditional constitutional law the courts were simply guardians of the boundaries between federal and provincial jurisdiction. The courts would not prohibit any action a legislature took within its own jurisdiction.³ The Charter of Rights has fundamentally changed the traditional relationship between the courts and the legislatures: the courts will now prohibit and modify decisions of legislatures. The courts' willingness to do so is fundamentally influenced by considerations of institutional legitimacy and competence.

Legislation is enacted by legislatures and enforced by the courts. This separation of function is fundamental to their respective institutional roles. In Hunter et al. v. Southam Inc. Mr. Justice Dickson (as he then was) said:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the Legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.⁴

Whenever the court extends, restricts, or otherwise modifies the scope of a particular law, or strikes it out completely, the court is deciding that a decision by an

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3. Some tentative steps were being taken using the Canadian Bill of Rights to control this unfettered power but the Charter of Rights overtook them. See the judgement of McIntyre J. in MacKay v. The Queen [1980] 2 S.C.R. 370, 114 D.L.R. 393.

elected government cannot be implemented. Maintaining the institutional legitimacy of the courts requires that they act judiciously to protect *Charter* rights without unduly trenching on the rights and responsibilities of the legislature.

Another restraint on the courts is institutional competence. The judicial process is dependent on the litigants for the information it has available and is constrained by its procedures from undertaking a wide ranging review of options. When it is reviewing legislation which represents a public policy choice made from among a variety of options the court does not have the benefit of research committees, public hearings, or competing political pressures.

Of greatest importance to our political system is that courts must claim to be, and appear to be, making decisions based on the Constitution and the law and not simply be choosing a competing political choice. Although the political decision to empower the courts to disallow legislation was reaffirmed by the legislatures when they agreed to the resolution which led to the adoption of the *Constitution Act, 1982*, the scope of this authority will always remain a judicious balancing act. The Supreme Court of Canada, in its interpretation of the scope of the rights and freedoms guaranteed by the *Charter*, in its assessment of the government’s attempts to justify laws which infringe those rights, and in the formulation of appropriate remedies, has been adjusting its attitude to the proper scope of judicial review. This will be an ongoing process.

When dealing with many issues related to the interests of disabled people there are choices among competing values and objectives. The choices made are based on historic, philosophical, financial, and other considerations. The courts have had very little experience in considering disability issues. To ask the courts to review activities and programs that have traditionally been left to social policy planners is to enter uncharted waters. We do not yet know how competent the courts will be to assess these policy decisions against the *Charter* or to formulate remedies which advance the interests of disabled people.
A. General Principles of Interpretation:

Of the many general principles applied by the courts in the interpretation of the *Charter* I will review the general approach to considering the scope of the *Charter* and whether it imposes on governments a positive duty to act.

The courts' approach to defining the scope of the rights protected is fundamental to successfully using the *Charter*. If an applicant makes a claim that a *Charter* right is being violated it is necessary for the court to agree that the *Charter* right encompasses the claim. For example, in *Rodriguez v. British Columbia (Attorney General)* the applicant argued that respect for human dignity formed part of the principles of fundamental justice protected by s. 7 of the *Charter*. Mr. Justice Sopinka, for the majority, held that respect for human dignity was not itself a principle of fundamental justice. It followed, therefore, that this part of her claim had to fail because her claim was not included in the protected right. The applicant also invoked s. 15 to claim that her equality rights were denied. L’Heureux-Dubé and McLachlin JJ., dissenting, rejected this claim, saying that this was not a case about discrimination and s. 15 had no application. This view was rejected by Chief Justice Lamer, dissenting, who relied on s. 15 to allow the application.

Discrimination against disabled people by legislation and government policy frequently takes the form of underinclusive programs or the absence of programs. The effectiveness of the *Charter* in advancing the interests of disabled people will be affected by the willingness of the courts to impose a positive duty of action on governments.

In its first decision involving the *Charter*, *Hunter et al. v. Southam Inc.*, the Supreme Court of Canada declared in ringing terms that the *Charter of Rights and Freedoms* was to be interpreted in a broad and liberal manner. Dickson J. (as he then was) said:

5. S.C.C., September, 1993, unreported.
A constitution... is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.6

The scope of the various rights and freedoms guaranteed by the Charter is determined by an analysis of the underlying interests which the Court perceives to lie behind the enunciated right. It is in this sense that the Charter is said to be a "purposive document": the purpose of the Charter is to protect the interests which have been identified as being protected by the particular right. Thus, in Southam, Dickson J. said:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.7

Again, in R. v. Big M Drug Mart Ltd., Chief Justice Dickson said:

The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.

... The interpretation should be, as the judgement in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question.8

Both the purpose and the effect of legislation is to be considered in assessing its conformity with the Charter.9

9. Ibid, Dickson, C.J. at D.L.R. p. 350: "... both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation". Wilson, J., concurring in the result, at D.L.R. p. 372, disagreed with this process of analysis, arguing the Charter is "first and foremost an effects-oriented document." She said:

For the sake both of consistency and analytic clarity it would seem preferable to avoid confusing the traditional approach to division of powers cases with the approach demanded by the Charter. The first stage of any Charter analysis, I believe, is to inquire whether legislation in pursuit of what may well be an intra vires purpose has the effect of violating
Since those early judgements the Court has continued to invoke these sentiments in its judgements. However, these same judgements have shown an increasing tendency of the Court to adopt a much narrower interpretation and to restrain its willingness to apply the Charter to limit governmental actions. This increasing restraint can be seen in both the Court's interpretation of the scope of the right in question and its application of section 1.  

Some provisions of the Charter, such as s. 23 dealing with minority language education rights and ss. 16-20 dealing with official languages, require the government to actively promote the rights enunciated. However, for other sections of the Charter the courts have adopted the view that the Charter is designed to constrain government action against individuals, not to require the government to act affirmatively to promote the right in question.

The Supreme Court has consistently held this limited view of the scope of the Charter. In the first case, Southam, Dickson J. said:

[The Charter of Rights and Freedoms] is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. 

This view was repeated in Operation Dismantle Inc. v. The Queen in which Madame Justice Wilson said "the central concern of [s. 7 of the Charter] is direct impingement by government" on the rights guaranteed.

Specifically in the context of s. 15, McKinney v. University of Guelph is further an entrenched right or freedom.


11. Some authors have argued that other provisions, such as s. 27 dealing with our multicultural heritage and s. 28 dealing with sexual equality, also require positive government action but no court has yet agreed with these views.


authority for the proposition that governments are not required to act to protect Charter rights. On the application of the Charter to universities Mr. Justice La Forest said: "This court has repeatedly drawn attention to the fact that the Charter is essentially an instrument for checking the powers of government over the individual." Another issue in this case was whether s. 9(a) of the Ontario Human Rights Code, 1981 was inconsistent with s. 15 of the Charter because its protection against age discrimination only applied to those between the ages of 18 and 65. La Forest J. held that this difference in treatment based on age did violate s. 15 but was saved by s. 1. Underlying his s. 1 analysis was the opinion that it was open to governments to deal with problems incrementally. The s. 1 analysis of Madame Justice L'Heureux-Dubé, dissenting on this point, said a legislature did not need to grant rights but "... if the province chooses to grant a right, it must grant that right in conformity with the Charter." Thus, in her opinion, the Code violated the equality rights protected by s. 15 because it gave protection from age discrimination to only a segment of the population. Unlike La Forest J., she was not prepared to allow inequality in the coverage of the law because the government did not want to tackle the question of mandatory retirement when it dealt with the problem of age discrimination. Madame Justice Wilson, dissenting, did not commit herself on the question of whether the Charter required the government to act, saying it was "... not self-evident to me that government could not be found to be in breach of the Charter for failing to act", noting there was no need to decide in that case. However, she agreed with L'Heureux-Dubé J. that once a government does act, it must do so in a non-discriminatory manner. Thus, she also found that the Code violated the equality rights section because of its limited definition of age.

15. Ibid, at p. 633.
17. Supra, fn. 14, at p. 691.
The refusal of the Court to interpret the *Charter* in a way which may compel government action to promote the rights guaranteed is a major weakness in the effectiveness of the *Charter* in advancing the interests of disabled people. It means that to use s. 15 to promote equality one must formulate the claim in terms, not of the lack of a program, but of discrimination in the delivery of an existing program.

For example, in *Eldridge v. British Columbia (Attorney General)* a deaf person argued that her equality rights were violated by the failure of the government to fund sign language interpreters when deaf patients go to the doctor. The absence of an interpreter has the result that the deaf patient receives a lower quality of medical care than a hearing patient (or, at least, must pay for a necessary service to ensure equality of medical care when a hearing person does not even consider the matter). The claim had to be formulated on the basis that, within the scope of an existing government program, the failure to fund interpreters was a question of discrimination between hearing and deaf patients. The court dismissed the claim, holding that the government simply did not fund "ancillary" medical services of which this was one. It was not a question of discrimination against deaf people in the services which the government did provide. Since the government did not fund such services it did not need to do so even when such funding would materially enhance the right of deaf patients to equally effective medical care.

Tysoe J. said:

> It is my view that the *Charter* does not place an affirmative obligation on the government to implement programs to assist disabled persons. . . . [I]f the government takes on an obligation and provides a benefit, s. 15(1) of the *Charter* requires that it be done in a manner that provides equality to all people. But there is no requirement on the government to provide the benefit.  

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19. (1993), 75 B.C.L.R. (2d) 68.

20. *Ibid*, at p. 89. See also *Brown v. Minister of Health* (1990), 66 D.L.R. (4th) 444 (B.C.S.C.) in which a claim that the government was violating s. 15 of the *Charter* because it did not fully fund the cost of the drug AZT when it did fully fund a number of experimental cancer drugs was dismissed. The court held that the different medical protocols in the experimental treatment of cancer and the use of AZT justified the government's different policies. Coultas J. said, at p. 463, "[i]t is not the sort of inequality addressed by s. 15 of the *Charter*."

It is clear that how the claim of right is understood directly influences the outcome of a Charter application. For example, in Eldridge the applicant understood her claim in terms of equally effective interaction with her doctor. The judge understood her claim to be that the government should provide another ancillary service.

The Supreme Court of Canada has engaged in a process of retrenchment after its initially broad and liberal interpretation of the scope of the rights protected and its willingness to check government actions. Disabled people have only recently begun to base their expectations in terms of rights. Since the scope of a right is defined by the collection of interests it protects a restricted interpretation of the scope of the rights guaranteed by the Charter does not help advance the interests of disabled people. It is important to note that there is very little jurisprudence on this subject and how the courts will apply the Charter to disability cases remains uncertain.

The law to date is that the government does not have to positively act on any matter (with the exceptions noted above) even if doing so would reduce a real inequality (or, for example, promote the right to security of the person). However, if the government does choose to act in a given field it must not discriminate unless such discrimination is justifiable under s. 1. Further, it seems that governments will be given the latitude to deal with problems incrementally if the distinctions drawn are considered to be demonstrably justified under s. 1.

B. What is Government?

The Charter applies to legislatures and governments. There is no collection of activities inherent in the concept of government. Governments do things they want to do. They may implement public policy through government departments and agencies, by directing special agencies to do things, or by regulating private actors. The role of government has changed over time as public expectations and political philosophies have
changed. A hundred years ago indigent people were a matter for churches and charities; today social welfare transfer payments make up a substantial portion of provincial government budgets. The government used to build and maintain highways; two provincial governments have recently privatized highway maintenance.

The particular difficulty lies in determining if special agencies established by legislatures to implement public policy without involving governments in day to day administration or private entities which are heavily regulated by government and which implement programs which the government would do itself but for the entities are subject to Charter scrutiny.

When considering whether the Charter may be used to enforce accessibility rights (or any other rights for that matter) it is essential to determine whether the entity in question is "government". Post secondary education is a matter of interest to governments and heavily supported by taxes. The Charter may be used to enforce accessibility rights in post secondary education facilities if they are community colleges21 but not if they are universities22. Universal medical care is a government responsibility. However, a mentally disabled person may receive treatment in the B.C. Forensic Psychiatric Centre, which is subject to the Charter,23 then receive treatment in the psychiatric beds of a general hospital, which is not,24 and then later move to long term care in a nursing home, which likewise would not be subject to Charter scrutiny. Public mass transportation is a government responsibility but in B.C. a special agency, B.C. Transit, has been set up to implement the policy. B.C. Transit operates a "handyDART" system for disabled people who cannot use the regular or accessible buses "in conjunction" with private agencies. Are

these agencies subject to the Charter when they are implementing a B.C. Transit policy?

Public libraries are established and financial by municipal governments and usually managed by a separate library board. If the building is not accessible or there is no information available in alternate formats for blind people could the Charter be used to obtain a remedy?

The starting point for determining to whom the Charter applies is s. 32(1), which provides:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In RWDSU v. Dolphin Delivery Ltd. the Supreme Court of Canada was called upon to decide if the Charter applied to a dispute between private parties, one of whom invoked a common law rule to justify the court order it sought. Mr. Justice McIntyre held that, in this context, the Charter did not apply because the courts were not part of government. He said that the Charter was limited in its application to legislatures and the executive and administrative branches of government, whether acting pursuant to legislation, regulations, bylaws, or the common law, or the actions of government officials. He left open the extent to which the Charter applies to subordinate bodies, saying:

25. [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174. This somewhat surprising result has been the subject of extensive criticism and commentary.

26. Wilson J., in McKinney, supra, fn. 14, at p. 560, explained that Dolphin Delivery held that legislation is subject to the Charter whether the government or private parties act on it: but for the common law to be subject to Charter scrutiny it must be the government relying on it. She said:

This is a necessary conclusion from [McIntyre J.'s] view that s. 32(1) requires either a legislative act (legislation broadly construed) or an act of the executive or administrative branch of government based on a common law principle which results in a violation of the Charter.

She confirmed that the result is that the Charter is applied differently in Quebec and rest of Canada.
It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures.\(^27\)

In *Andrews v. Law Society of British Columbia*, (which dealt with legislation) McIntyre J. said:

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\ldots \text{discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities.}
\]

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\ldots \text{Whether other governmental or quasi-governmental regulations, rules or requirements may be termed laws under s. 15(1) should be left for cases in which the issues arises.}\(^28\)
\]

The problem of identifying which "other creatures" and "quasi-governmental regulations" would be subject to *Charter* scrutiny was not pursued in either case.

In *Slaight Communications Ltd. v. Davidson*\(^29\) the issue was whether an arbitrator appointed pursuant to the *Labour Code*\(^30\) was subject to *Charter* oversight. The Court found that the arbitrator was an integral part of the government machinery set out in the *Labour Code* to effect the purpose of the statute. The legislature or government could not evade *Charter* responsibility by simply appointing a person to carry out the purposes of the legislation. In *McKinney*, La Forest J. affirmed his opinion in *Slaight Communications* that the arbitrator was controlled by the *Charter* because the "close nexus between the statute and the legislative scheme and governmental administration [was] immediately obvious."\(^31\)

In an attempt to establish some consistent analytical approach to determining whether a particular entity is "government", in *McKinney v. University of Guelph*, Wilson J., dissenting, proposed three tests, to be considered in combination, to determine whether

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27. & \text{ *Supra*, fn. 25, at S.C.R. p. 602.} \\
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an activity is a government function. 32 1) The "control" test asks if the body in question is part of the legislative, executive, or administrative branches of government and, if not, if it is subject to direct or effective control by one of these branches. This test requires a review of the nature and extent of government control over the activity to determine if there is a "clear nexus between government and the particular impugned activity". 33 Wilson J. noted that it is not uncommon for governments to try to insulate themselves from difficult social issues by establishing arms length agencies in which the government avoids involvement in the agency's day to day activities. She cautioned against applying a restrictive interpretation of the control test to find such a body is not government so that it escapes Charter scrutiny. 2) The "government function" test asks whether the performance of a given activity is a government function. "A function becomes governmental because a government has decided that it should perform that function, not because the function is inherently a government function." 34 Wilson J. was careful to note that the scope of government functions is often not clear and changes over time. 3) The "government entity" test focuses on "whether an entity performs a task pursuant to statutory authority and whether it performs that task on behalf of government in furtherance of a government purpose." 35 This test looks to identify entities which are outside the usual government structures but, because of statutory authority or government policy, are designed to implement policies in areas which the government has identified as matters of public concern. Wilson J. used Eldorado Nuclear Limited, a Crown agent established by statute to implement government nuclear policy, as an example.

32. Cory J. agreed with Wilson J.'s tests and her conclusion that universities were "government" and the retirement policies were subject to Charter scrutiny but agreed with LaForest J. that they were saved by s. 1. L'Heureux-Dubé J. did not disagree with Wilson J.'s tests but, "even under that broad test", she determined that universities were not "government".


34. Ibid, p. 589.

35. Ibid, p. 590.
Wilson J. was careful to stress that these tests are only indicators and parties may explain why a body in question is not government. She also noted that, just as the role of government changes, the questions to ask to identity government may need to change. Using these tests she went on to identify universities as "government" for the purposes of Charter scrutiny.

La Forest J., who wrote for the majority, was careful not to commit himself to any particular test but did specifically reject Wilson J.'s approach to the definition of government. He said it was not sufficient to be incorporated by statute directly or otherwise (eg. a business incorporated pursuant to a corporations act) or to be performing an important public service: "A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty." 36

La Forest J. applied a much narrower approach to determining what is government. He would look for evidence that the entity was under the "routine and regular control" of government (when they would be, in effect, Crown agencies whether called that or not) or was "perform[ing] a quintessentially governmental function." He gave as an example of this later entity municipal councils because "[t]hey enact coercive laws binding on the public generally for which offenders may be punished." 37 He then said:

I hasten to add that I agree with my colleague Wilson J. that the Charter is not limited to entities which discharge functions that are inherently governmental in nature. As to what other entities may be subject to the Charter by virtue of the functions they perform, I would think that more would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments. It seems to me that my colleague Wilson J. takes the contrary view. To the extent that she does, I respectfully disagree. 38

*Lavigne v. O.P.S.E.U.*[^39^] was a challenge to the dues check-off provisions of a collective agreement between the Ontario Public Service Employees Union and the Council of Regents of a community college. La Forest J. held that the obligation to pay dues was attributable to the government. Unlike the situation in *Douglas/Kwantlen Faculty Assn. v. Douglas College*[^40^] in which the College's enabling legislation specified that it was a Crown agent, in *Lavigne* the legislation provided that the Minister was to govern the College with the assistance of the Council of Regents. The Minister exercised routine and regular control and this made the Council "an emanation of government" or part of the "fabric of government". This was contrasted with universities which, although extensively regulated and funded by government, are "essentially autonomous bodies"[^41^].

Having found that the College was subject to the *Charter*, La Forest J. rejected the argument that even if the Council was "government" not all actions of government are constrained by the *Charter*. He said that even if the union had wanted the compulsory dues check off it was the government (through the Council) which implemented the policy and it was the action of checking off which made the policy a governmental action. La Forest J. recognized that the role of government encompasses many activities which go beyond traditional notions of government. In rejecting the argument that the government in this situation was merely engaged in a contractual relationship La Forest J. said that "government activities which are in form 'commercial' or 'private' transactions are in


[^41^]: Wilson J., with L'Heureux-Dubé J., dissenting, *supra*, fn. 39, maintained her position in *McKinney*, *supra*, fn. 14. She said, at p. 239:

I fully appreciate that in *McKinney* ... only two of my colleagues endorsed my test for determining whether or not a body is a government actor ... On the other hand, I am unable to find a different test of general application enunciated in the reasons of the majority. Those reasons appear to me to reflect an *ad hoc* approach to the status of each entity brought before the Court in order to determine whether or not it forms "part of the apparatus of government" so as to be subject to *Charter* review. This being so, I do not feel as constrained by precedent as I otherwise might. Indeed, I am unstated in the view that this Court has a duty to take a structured approach to this issue and establish appropriate criteria if at all possible for distinguishing those bodies which are subject to *Charter* constraint from those which are not.
reality expressions of government policy.\textsuperscript{42}

Professor Elliot has persuasively argued that the key to analyzing the issue of whether a particular entity is subject to the \textit{Charter} is the precise identification of both the particular entity and the particular function which is being challenged.\textsuperscript{43} There is a strong tendency of governments to try to insulate themselves from the potential problems arising from the day to day administration of public policy decisions. Where government stops is not clear. As long as the dichotomy between public and private action remains there will be no fully satisfactory solution. To date the Supreme Court of Canada has opted to take an \textit{ad hoc} approach to the question and examine each case for routine and regular control by an entity which is undoubtedly government, for indications the entity is performing quintessentially government functions, or indications the entity is in effect a Crown agent.

\section*{C. Equality Rights under S. 15(1): General Principles:}

Section 15(1) of the \textit{Charter of Rights and Freedoms} guarantees the right to equal protection and benefit before and under the law without discrimination based on an open ended list of grounds:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.\textsuperscript{44}

Although maintaining its rhetoric that the \textit{Charter} is to be interpreted in a 'large',

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\item \textsuperscript{42} \textit{Ibid, at D.L.R. p. 621.}
\item \textsuperscript{43} Robin M. Elliot, \textit{Scope of the Charter’s Application}, (1993) 15 A.Q. 204.
\item \textsuperscript{44} \textit{Supra, fn. 1.} S. 15(2) provides:
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Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
The Charter of Rights and Freedoms

'broad', and 'liberal' fashion, the Supreme Court has imposed a restrictive and limited interpretation of the equality rights section. This interpretation is based on three propositions which both define and limit the effect of the section. First, the section is limited to the application or effect of law imposed through government. In the first s. 15 case the Supreme Court dealt with, Andrews v. Law Society of British Columbia, McIntyre J. said:

...discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities.

...section 15(1) is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.45

This limitation is an inevitable result of the decision in Dolphin Delivery. Since the rest of the Charter applies only to government, s. 15 must be interpreted as restricted to various types of law as implemented by government. The next two limitations are choices the Court did not have to make even given the Dolphin Delivery decision.

Second, not every source of inequality can be challenged. The Court has adopted what it calls the "enumerated and analogous grounds" approach to determine who can call on the right to equality. The source of the inequality must be related to a ground which is listed or which is analogous to the ones listed. Thus, the courts have refused to consider inequality arising from the province of residence46 or heterosexual legal marriage47 as

45. Supra, fn. 28, at D.L.R. pp. 9-10.
46. For example, in R. v. Turpin, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97, unequal treatment in the choice of method of trial depending on the province in which a murder is committed was found not discriminatory within the meaning of s. 15.
47. For example, Schachtsneider v. The Queen, F.C.A., May, 1993, unreported, in which the claim that s. 15 rights were violated in the Income Tax Act because married people could not claim the same benefit as common law couples was dismissed. Mahoney J. said it was necessary to determine whether the applicant's personal characteristics are analogous to the personal characteristics of the enumerated grounds in the sense that they define a disadvantaged discrete and insular minority. Married people do not fit these criteria. Linden J., concurring in the result, said that it was necessary to distinguish the ground of discrimination (here marital status) and the group claiming discrimination (here married people). Married people are not socially disadvantaged in our society. Married people are not
attracting s. 15 interest.

Third, equality is defined as the absence of discrimination. Judge Rosalie Abella has described this notion of equality as follows:

Equality means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity fully to develop his or her potential, we have achieved a kind of equality. This is what section 15 of the Charter affirms: equality defined as equal freedom from discrimination.

Equality is not a concept that produces the same results for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. 48

What principles should guide the courts in their interpretation of this section, as with the rest of the Charter, is influenced by one's approach to the institution of judicial review. I do not disagree with the approach the Supreme Court has taken with respect to s. 15. In my view the approach is consistent with a reasonable reading of the section. It is broad enough to effect real change while being restrained enough to keep the courts within appropriate boundaries of judicial review. In relation to using the Charter to advance the interests of disabled people, s. 15 enumerates both mental and physical disability as prohibited grounds of discrimination and the courts have clearly recognized that the objective of s. 15 is to promote equality by reducing the disadvantages experienced by the groups protected by the section. As will be seen, the definition of "law" for the purposes of s. 15 is sufficiently broad to encompass almost every action taken by government authorities.
i. Equality Without Discrimination:

The Supreme Court of Canada has not discussed the scope of each of the four equality guarantees or how they relate to each other. Wilson J. has said, in *R. v. Turpin*, that "[i]n defining the scope of the four basic equality rights it is important to ensure that each right be given its full independent content, divorced from any justificatory factors applicable under s. 1 of the Charter."\(^{49}\) The four descriptions of equality were designed to overcome the restrictive interpretation of the concept which the Court used in interpreting the *Canadian Bill of Rights*. The wording of s. 15(1) was intended to give a clear direction to the courts that inequality arising from law, however it is manifested, is a violation of the Charter guarantee of equality. This accords with the view of Professor Tarnopolsky, as he then was, that the four phrases are intended to ensure all the bases are covered as far as equality guarantees are concerned.\(^{50}\) In sum, whatever may distinguish these four equality rights, the courts are not to restrict their scope by artificial constructs such as were devised by the Supreme Court of Canada for the interpretation of the *Canadian Bill of Rights* which had the effect of making the Bill essentially irrelevant.

In *Andrews v. Law Society of British Columbia*, McIntyre J., dissenting, observed "...every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, ...identical treatment may frequently produce serious inequality."\(^{51}\) Despite these comments, the Court has consistently found inequality

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49. *Supra*, fn. 46, at C.R. p. 121. For the purposes of this case, dealing with variations in trial procedure in murder cases between some provinces, Wilson J. only needed to define equality before the law. She said that, at a minimum, the right protected individuals from being subject to harsher treatment than others.

50. Justice W.S. Tarnopolsky, revised by W.F. Pentney, *Discrimination and the Law*, p. 16-11. Professor Elliot, *Supra*, fn. 10, (1992) A.R.L.P. 1 at p. 14, suggests that the identification of which equality right has been infringed may not be required at all because the S.C.C. consistently jumps over that part of s. 15 without comment.

51. *Supra*, fn. 28, at D.L.R. p. 10. Although dissenting because of his s. 1 analysis, McIntyre J.'s analysis of s. 15 was agreed with by the other judges.
where there is different treatment or a lesser benefit. The explanation for this seeming
contradiction is that a finding of inequality alone is not sufficient to attract s. 15 interest.

McIntyre J., in Andrews, said:

Once it is accepted that not all distinctions and differentiations created by law are
discriminatory, then a role must be assigned to s. 15(1) which goes beyond the
mere recognition of legal distinction. A complainant under s. 15(1) must show not
only that he or she is not receiving equal treatment before and under the law or
that the law has a differential impact on him or her in the protection or benefit
accorded by law but, in addition, must show that the legislative impact of the law
is discriminatory.

The Court will find an inequality where there is different treatment but a finding
of inequality which violates s. 15(1) requires an inequality which causes, or results in,
discrimination. This follows logically from the interpretation that the purpose of s. 15(1)
is to guarantee a form of equality indicated by the elimination of discrimination caused
by law.

The definitions of discrimination developed in human rights law have been adopted
for interpreting s. 15 of the Charter. McIntyre J., in Andrews said:

In general, it may be said that the principles which have been applied under the
Human Rights Acts are equally applicable in considering questions of
discrimination under s. 15(1).

In McKinney La Forest J. said "... as Andrews v. Law Society of British
Columbia made clear ..., not only does the Charter protect from direct or intentional
discrimination; it also protects from adverse impact discrimination. ...".

After adopting the concepts of discrimination as developed in human rights
jurisprudence for use in Charter analysis, McIntyre J., in Andrews, again with approval
of the majority, defined discrimination in the following words:

52. See for example Turpin, supra, fn. 46, and McKinney, supra, fn. 14, where the Court found
differential treatment, simpliciter, enough to warrant going on to the next stage of the s. 15 analysis.


55. Supra, fn. 14, at p. 647.
I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.56

La Forest J., in Andrews, said:

...the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague has defined it, i.e., on the basis of "irrelevant personal differences" such as those listed in s. 15 and, traditionally, in human rights legislation.57

In R. v. Turpin the Supreme Court finally put an end to the approach then common in lower level courts of finding inequality and a violation of s. 15(1) in the face of any difference in treatment by law. Wilson J., per curiam, after finding the accused had been denied equality before the law, said:

Differentiating for mode of trial purposes between those accused of s. 427 offenses in Alberta and those accused of the same offenses elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case.

In McKinney Wilson J. summarized the state of the law in this regard, saying "[i]t is, I think, now clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations."59 She argued that where the inequality was based on one of the named grounds it would be difficult to show that the distinction was not

56. Supra, fn. 28, at D.L.R. p. 18.
discriminatory but such a conclusion was not an irrebuttable presumption. Even though age is an enumerated ground of discrimination, she said it was necessary to look for prejudice. She said that, in this case, stereotype and prejudice did underlie the mandatory retirement policies. However, in the same case, La Forest J. said the retirement rule burdened those subject to it because of their age and, without more, found there was a violation of s. 15. Much of his s. 1 analysis implicitly rejected the view that there was negative stereotyping and prejudice underlying the policy.

The Court's approach to this subsection was summarized by Chief Justice Lamer in *R. v. Swain*.

The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits with the overall purpose of s. 15 -- namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

Although s. 15 uses the words 'equality' and 'discrimination' the two concepts are interpreted as opposite sides of the same coin. Inequality exists if there is discrimination and discrimination is the indicator of inequality. In the words of Rosalie Abella, implicit in the notion of equality is not the right to equality as a metaphysical absolute concept, but the right to be treated as an equal, free from distinctions which are unjustified. These arbitrary distinctions are the indicia of discrimination and the two concepts thereby merge into the definition of equality. 


The common traditional test of equality was to assess whether a claimant was denied a benefit or subject to a greater burden than others who were similarly situated. Thus the test was referred to as the similarly situated test.

In *Andrews* the Court subjected the similarly situated test to scathing criticism and apparently rejected it outright. McIntyre J., dissenting in the outcome but agreed with by other judges on this point, said that, in resolving equality questions,

> [the similarly situated] test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.  

Some commentators emphasized the Court's rejection of the test and suggested that *Andrews* presaged an approach to s. 15 which would ensure that the legal system did "not exacerbate societal disadvantage of persistently disadvantaged groups". Other commentators noted that the Court's description of the similarly situated test was somewhat limited and even unfair, and, despite its clear rejection as the test for equality in s. 15, the essence of the test remained. The Court's criticism was based on a description of the test which considered equality only within the context of the challenged law itself which was a very limited understanding of the test. In fact, it can be argued that when McIntyre J. said "[c]onsideration must be given to the content of the law, to its purpose, and its impact . . ." he was referring to the more sophisticated modern understanding of

62. *Supra*, fn. 28, at p. 13. See also *Turpin*, *supra*, fn. 46, in which Wilson J. said, at C.R. p. 126, that the similarly situated test had been "clearly rejected by this Court in *Andrews*", and *McKinney*, *supra*, fn. 14, in which La Forest, J. said at p. 647:

> The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe that it survived *Andrews v. Law Society of British Columbia*.

The Court's rejection of the phrase 'similarly situated' does not mean that comparison between the included and excluded group is not a necessary element of an equality claim. To believe that you are not being treated equally requires that you compare yourself to someone else. *Andrews* adopted a test which requires looking beyond the words of the impugned law to inquire into its purpose and effect on the included and excluded groups and determining if the two groups are sufficiently similar in relation to the purpose and effect of the law to succeed with a claim they should be treated alike. 65 Professor Gibson queried whether the phrase 'similarly situated' could survive *Andrews* but said that any new terminology would not change the essence of the test: Considering the context and purpose of the law, are the two groups sufficiently similar so that to treat them differently is a discriminatory denial of one of the four equality rights?66

Any test based on comparison, similarity, and difference must include the concept of reasonable accommodation if disabled people are to achieve equality. Although McIntyre J., in *Andrews*, commented that different treatment may not result in inequality and identical treatment may produce inequality67 the Supreme Court has not had occasion to comment on whether reasonable accommodation must be factored into the s. 15 analysis. It is to be expected that it would be since the Court has adopted the principles of human rights law to assess what is discrimination under s. 15. Reasonable


65. In *Fenton v. Forensic Psychiatric Services Commission*, (1991) 56 B.C.L.R. (2d) 170, the appellant argued that he should receive the statutory minimum wage prescribed by the *Employment Standards Act*, S.B.C. 1980, c. 10, for work done while he was a resident at the institution and engaged in the institution's "work program". The B.C. Court of Appeal rejected his appeal on the basis that he was not an "employee" within the meaning of the *Employment Standards Act*. Since he was not "like" an employee he had no *Charter* claim to equality with employees.


accommodation must be considered before comparing some groups of disabled people to other groups. One concern is that unless reasonable accommodation is considered in relation to the description of the disabled group the applicant may be found insufficiently similar (or so different from the comparison group) to claim equality. The other concern arises at the remedy stage where reasonable accommodation may be required to ensure disabled people obtain equality of opportunity or benefit. 68

ii. What is "Law" for the Purposes of Section 15?

The purpose of s. 15(1) is to prohibit certain forms of inequality created by "law". The word "law" in this section of the Charter is interpreted very broadly, as it should be since the section is activated only if the alleged inequality arises from the operation of law.

In McKinney the Court reviewed and consolidated previous decisions interpreting the meaning of "law" for the purposes of s. 15(1). La Forest J., although finding the University not to be part of government making his comments on this matter obiter, said that statutes and regulations, as well as the exercise of a statutory power or discretion or conduct by state officials, are all "law" for the purposes of s. 15(1). 69 In this case the University had adopted the mandatory retirement policy in a formal manner. That this policy had been accepted by the employees did not change its characterization as "law".

68. In Rodriguez, supra, fn. 5, Lamer C.J., dissenting, implied he considered reasonable accommodation a factor in devising a s. 15 remedy. He would have declared the assisted suicide provisions of the Criminal Code inconsistent with the Charter but stay its effect to give Parliament time to devised a new law. In order to grant an effective remedy to the appellant he would have granted her a constitutional exemption. The concept of reasonable accommodation is reflected in this exemption because it says, in effect, that a person who cannot do what others are allowed to do because of disability may be accommodated by a special rule so that person can obtain the same benefit as others. In this case, others can commit suicide; the appellant can also commit suicide if she is accommodated by having someone help her.

but La Forest J. did raise the possibility that that might be relevant in the s. 1 analysis.\textsuperscript{70} He made clear that the power of government to contract does not include the power to contract in violation of the \textit{Charter}.

Wilson J., dissenting, described a very broad definition of "law" for the purposes of s. 15, saying that any action or conduct by a government was subject to s. 15. She said that if the entity to which the Charter applies denies equality the court must redress that inequality whether it arises from legislative activity, common law, or simply conduct. She said:

I see no sound reason why government conduct which violates an individual’s equality rights under s. 15 is not subject to redress by the courts in order to restore that individual’s declared right to equality under the law. Section 15, on this interpretation, does not require a search for a 'law' which discriminates but merely a search for discrimination which must be redressed by law”.\textsuperscript{71}

Wilson J. noted that although the mandatory retirement rules came into effect in slightly different ways (and had been negotiated at some point) in fact employees of all the universities were bound by the policies which were in effect a "law of the workplace".\textsuperscript{72}

In contrast to Wilson J.'s very broad interpretation of the word "law", Mr. Justice Sopinka expressed a much narrower view. He specifically did not express a final opinion on the question but said that "[n]ot all actions of a governmental body will qualify as law. Indeed not all activities of an entity that is generally carrying on the functions of government will be governmental in nature."\textsuperscript{73} He said the purpose of the Charter is to protect against the state: "This suggests that there must be an element of coercion involved before the emanations of an institution can be classified as law."\textsuperscript{74}

\textsuperscript{70} The essence of collective bargaining is that the union can represent and bind its members. Dissenting and new employees must accept the bargain until the next round of negotiations offers the opportunity to change the terms and conditions of employment.

\textsuperscript{71} \textit{Ibid}, at p. D/272.

\textsuperscript{72} \textit{Ibid}, at p. D/277. Several Ontario universities were involved in this case.

\textsuperscript{73} \textit{Ibid}, at p. D/225.

\textsuperscript{74} \textit{Ibid}, at p. D/225.
In *Douglas/Kwantlen Faculty Assn. v. Douglas College*, delivered at the same time as *McKinney*, the judges affirmed their views of the meaning of the word "law" as expressed in *McKinney*. Sopinka J. expanded his view in the context of faculty at a community college who were compulsory members of a union which had signed a collective agreement. He said:

While I do not dispute that "law" is not confined merely to legislative activity, I am of the view that an element of coercion must be present even in government "activity" or "program" for such to be reasonably characterized as law. This element of imposition or prescription by the state distinguishes law from voluntarily-assumed rights and obligations.

My colleague Wilson J. has pointed out that the nature of discrimination is such that attitudes rather than laws or rules may be the source of discrimination. I agree with this general proposition, and it is for this reason that human rights legislation generally proscribes all conduct which is discriminatory on a prohibited ground. With this example before them, the framers of the *Charter* chose to limit the *Charter*’s application to conduct that qualifies as law. While this term is to be given a large and generous construction, I do not think that it can be ignored. In my opinion, it was not intended to apply to purely consensual conduct. The *Charter* was intended to protect the individual from the coercive power of the state and not against the individual’s own voluntary conduct in dealing with state entities.\(^75\)

Section 15 of the *Charter* guarantees equality without discrimination. Essentially any difference in treatment is enough to pass the inequality requirement and move the inquiry on to the question of discrimination. Mental and physical disability are specified among the enumerated grounds of discrimination in s. 15. The courts’ broad interpretation of the word "law" for the purposes of s. 15 and their emphasis on the section’s purpose of being to remedy disadvantage experienced by groups subject to stereotyping, historical disadvantage, and political and social prejudice mean that it is potentially a powerful tool to advance the interests of disabled people. Discrimination is defined broadly to include both direct and indirect, or adverse effect, discrimination. Although the similarly situated test is apparently rejected in fact there is still a need for comparison. The court has not yet had an opportunity to discuss whether reasonable

\(^75\) *Supra*, fn. 40, at p. D/434.
accommodation must be taken into account in describing the comparison groups. However, it is fairly clear that reasonable accommodation will be taken into account in devising a remedy once a violation of the Charter is found.

D. Interpreting Section 1:

Once an infringement of the Charter of Rights is found "any justification, any consideration of the reasonableness of the enactment, indeed, any consideration of factors which could justify the discrimination" takes place under s. 1 which states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In R. v. Oakes, the first comprehensive decision on the interpretation of s. 1, Dickson C.J. held that the section has two functions: 1) to guarantee certain rights, and 2) to set out the "exclusive justificatory criteria" which can limit those rights (outside of s. 33). The onus of proof is on the party invoking s. 1 to justify a limitation on a right; the standard is the civil standard, the preponderance of probability. Dickson C.J. noted that within this test there are different degrees of probability and that for s. 1 of the Charter:

... a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit... A court will also need to know what alternative measures for implementing the objective were available to the


77. The Supreme Court is showing a tendency to introduce interest balancing considerations into the initial rights determination stage: See Professor Elliot, Developments in Constitutional Law: The 1989-90 Term, supra, fn. 2. at p. 126 et seq.

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legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident. 79

To meet the requirements of s. 1 a limitation on a right guaranteed by the Charter must be both "prescribed by law" and "demonstrably justified". My discussion of the "prescribed by law" requirement is quite brief but one can still see that the Supreme Court is adjusting its early rigorous application of this requirement to meet the needs of our administrative state. The Court has had to relax its notion of "law" to reflect the reality that so many decisions in relation to social and economic policy are made by administrators reacting to events that it would be impossible to pass legislation or issue regulations fast enough to meet the needs.

My more extensive discussion of the "demonstrably justified" requirement shows that, although the Supreme Court consistently refers to the Oakes test, the Court has revised the test substantially and lost its enthusiasm for vigorously challenging the evidence presented to justify infringements on rights. Compared to its decisions in the earliest Charter cases, the Court has significantly increased its posture of deference to the state, especially in relation to legislation dealing with social and economic policy. The Court is, I think, showing a much greater concern about its institutional competence to second guess the policy decisions of governments. Whether this is a negative development depends on how much faith one has in the ability of the judiciary to fully understand issues related to disability (or other issues that may interest the observer). It is worth repeating that the courts have had little experience with disability issues and that the policy choices are really choices - it is not self-evident what equality for disabled people really looks like.

Section 1 - The Meaning of "Prescribed by Law":

Any limitation of rights permitted under s. 1 must be "prescribed by law". This element includes a requirement that the putative violation must be expressly or implicitly provided for by a law and that the law must have sufficient precision that it provides an intelligible standard for judges to apply.

In R. v. Therens\textsuperscript{80} the Court determined that a limit may be prescribed by law by the express terms of a statute or regulation, the application of a common law rule, or by the necessary implication or operating requirements of a statute, regulation, or common law rule. In this case it was the police, when they neglected to inform the accused of his right to counsel, who imposed the limitation, not the law they were enforcing. Since the limitation was neither prescribed nor necessarily implied by law, s. 1 could not be used to justify the violation of the Charter right to be informed of the right to retain and instruct counsel.\textsuperscript{81}

Thus, the interpretation of "law" under s. 15(1) is extremely broad but under s. 1 it is narrow. Wilson J., in McKinney, commented with approval on these different definitions of the word "law":

Section 1... serves the purpose of permitting limits to be imposed on constitutional rights when the demands of a free and democratic society require them. These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective.\textsuperscript{82}

However, this does not mean that the precise actions have to have been prescribed


\textsuperscript{81} See also R. v. Thomsen, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, where, although the statute did not specify a limitation on the right to retain and instruct counsel, the necessary implication of being required to provide a breath sample to a road side screening device upon demand was that the right would be denied. The objective of removing drunk drivers from the road was sufficient to justify the denial.

\textsuperscript{82} Supra, fn. 13, at p. D/274.
by law. The authority to impose rules or decisions must be prescribed by law but the actual rule or decision need not be a "law" within the meaning of s. 1. There must be a law, narrowly defined, which allows the application of discretion. Then, it is necessary to determine whether the way the discretion was exercised is justifiable in the particular circumstances. In the case of the universities it was sufficient for the law to authorize the retirement policies in general, but not the details, and if in their details they were not demonstrably justified the universities would have exceeded their jurisdiction.\(^{83}\)

In *Committee for the Commonwealth of Canada v. Canada*\(^ {84}\) the applicant challenged a ban on the distribution of political pamphlets at Dorval airport. For Lamer C.J. and Sopinka J. a regulation which the government proffered to show the ban was prescribed by law did not cover the material in question. The government then offered an internal policy directive which Lamer C.J. and Sopinka J. rejected as insufficient to conclude that the ban was pursuant to a "law". They said:

> The government's internal directives or policies differ essentially from statutes and regulations in that they are generally not published and so are not known to the public. Moreover, they are binding only on government officials and may be amended or cancelled at will. For these reasons, the established policy of the government cannot be the subject of the test under s. 1 of the *Charter*.\(^ {85}\)

The reasonable precision requirement demands that a law be sufficiently precise in its meaning that people can know, with the assistance of judicial interpretation if necessary, if they are in compliance. The jurisprudence to date suggests that governments

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83. *Ibid*, at p. D/282. See also *Slaght Communications Inc. v. Davidson*, *supra* fn. 29, in which the discretionary power of remedy of an arbitrator under the *Canada Labour Code*, R.S.C. 1970, c. L-1, was at issue. It was sufficient that the law authorized the discretion for the exercise of the discretion to be characterized as prescribed by law. If a remedial order was demonstrably justified the arbitrator remained within jurisdiction. If it was not then the arbitrator would have exceeded his/her jurisdiction and the order would be of no effect. In this case the court determined that part of the order violated the freedom of expression guarantee and that part of the order was struck down.


85. *Ibid*, at p. 171. While two judges did accept that the regulation encompassed the banned material they also said that the actions of the government officials constituted a limit prescribed by law since they were acting pursuant to the Crown's legal rights as a property owner arising from the Québec *Civil Code* or the common law.
should have little difficulty in meeting this condition.\(^{86}\)

In *Irwin Toy Ltd. v. Québec (Attorney General)*\(^{87}\) it was argued that the sections of the impugned legislation which described what advertisements were directed at children were so imprecise that one could not know which ads were and which were not directed at children. The Court was unimpressed with this argument and simply said that the legislation provided "an intelligible standard" which could be applied by judges. The Court did allow that "where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law'."\(^{88}\)

*Osborne v. Canada (Treasury Board)* dealt with a challenge to the legislation which prohibited federal public servants from engaging in political activity. Sopinka J. found that the legislation in question met the "intelligible standard" test, and noted that the court "has shown reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers."\(^{89}\) He noted that modern government frequently needs to place wide discretion in the hands of administrators and that it was more appropriate to deal with questions of vagueness in the next stage of s. 1 analysis.

ii. Section 1 - Demonstrably Justified:

Building on concepts mentioned in earlier cases, Dickson C.J., in *R. v. Oakes*, set out the initial approach for interpreting s. 1. He described a test with four parts (which have been highlighted) as follows:


To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society...

Secondly, . . . the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. The involves "a form of proportionality test"... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identify as of "sufficient importance".90

The Oakes test was quickly modified in succeeding cases. Along with changes in wording and emphasis, particularly in cases involving social and economic policy, the vigour with which the component parts of the test are applied has been relaxed. In the words of Mr. Justice Cory in Dickason v. University of Alberta: "In its application, the Court has adopted a flexible standard of proof which responds to the varying contexts in which the state seeks to invoke s. 1 justification for the impugned legislation."91 In substance this "flexible" standard is much more deferential to the legislature.92

Andrews v. Law Society of British Columbia dealt with the requirement of the British Columbia Law Society that lawyers be Canadian citizens. McIntyre J., dissenting, argued that:

90. Supra, fn. 78, at D.L.R. pp. 227-8. The reverse onus provisions relating to drug trafficking were struck down since they did not met the rational connection element of the test.


92. Some members of the Court, notably La Forest J., consistently decline to endorse the Oakes approach, even as later severely modified, although they have provided no alternative comprehensive test. In consequence, the modified Oakes approach is the clearest guide to how the Court interprets s. 1.
the standard of "pressing and substantial" may be too stringent for application in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. In my opinion, in approaching a case such as the one before us, the first question the courts ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social object which would warrant overriding constitutionally protected rights.\(^{93}\)

In response to this argument Wilson J. maintained her view that the Oakes test should be applied vigorously. She said that McIntyre J.'s concern about the community at large was dealt with by the decision that not every distinction drawn in legislation is discriminatory. But once a violation of s. 15 is found,

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given\ that\ s.\ 15\ is\ designed\ to\ protect\ those\ groups\ who\ suffer\ social,\ political\ and\ legal\ disadvantage\ in\ our\ society,\ the\ burden\ resting\ on\ government\ to\ justify\ the\ type\ of\ discrimination\ against\ such\ groups\ is\ appropriately\ an\ onerous\ one.\(^{94}\)
\]

Despite Wilson J.'s view, the pressing and substantial requirement has been converted into a valid legislative objective test and practically every reason put forth by the government in cases since Oakes has been accepted with little comment.\(^{95}\)

An unconstitutional purpose, or an illegitimate objective, is sufficient to invalidate legislation.\(^{96}\)

In \textit{R. v. Big M Drug Mart Ltd.} it was argued that, although the \textit{Lord's Day Act}\(^7\) had a religious purpose when it was passed, it had assumed a secular purpose in today's society. Dickson J. rejected any application of a "shifting purpose" approach to

\(^{93}\) \textit{Supra}, fn. 28, at p. 25.

\(^{94}\) \textit{Ibid}, p. 34.


\(^{96}\) \textit{Big M Drug Mart, supra}, fn. 8. But if there are multiple objectives the legislation may be upheld as long as at least one of the objectives is legitimate. See, for example, \textit{R. v. Butler[1992]} 1 S.C.R. 452, 89 D.L.R. (4th) 449, in which Sopinka J. ruled that the purpose of the obscenity provision of s. 163 of the \textit{Criminal Code} to promote the public interest in a decent society by imposing certain standards of public sexual morality, was inimical to the exercise of individual freedom and hence an illegitimate objective. There was another objective which was legitimate which allowed the court to continue with the s. 1 analysis.

determining the purpose or objective of a challenged law.\textsuperscript{98} The objective of the law was to promote the observance of a Christian sabbath on pain of certain penalties which was inconsistent with the \textit{Charter guarantee} of freedom of religion. In \textit{R. v. Butler},\textsuperscript{99} the government proposed that one of the purposes of the obscenity provisions of the \textit{Criminal Code} was to prevent harm to society. Sopinka J. acknowledged that the type of harm that Parliament would have thought could result from obscenity would have been different from a modern characterization of such harm which he described as being the perpetuation of negative stereotypes about the relations between the sexes and the purported tendency of pornography to perpetuate violence against women. Sopinka J. affirmed the rejection of a shifting purposes doctrine but said that in this case the objective had remained the same even though the understanding of how that objective is advanced has changed.\textsuperscript{100}

The rational connection requirement can be met by showing that there is a logical connection between the measure and the furtherance of the objective or that "the impugned governmental action can rationally be said to further the proffered objective(s)".\textsuperscript{101} In \textit{Lavigne}, Wilson J., the strongest supporter of a vigorous application of the \textit{Oakes} test, said in \textit{obiter}, "[t]he \textit{Oakes} inquiry into 'rational connection' between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered

\textsuperscript{98} \textit{Supra}, fn. 8, at D.L.R. pp. 352-3.

\textsuperscript{99} \textit{Supra}, fn. 96.

\textsuperscript{100} \textit{Ibid}, at D.L.R. p. 478, referred to the decision in \textit{Irwin Toy Ltd v. Quebec (Attorney-General), supra, fn. 87, at p. 618}:

\textit{In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place... However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available}.

by the means government has chosen to adopt. In Butler Sopinka J. noted that the scientific evidence to support the argument that there was a link between violence and pornography was not conclusive but held that it was sufficient for the government to have a "reasonable basis" for believing such a link existed.

The minimal impairment aspect of the proportionality component has been transformed into an inquiry whether the legislature had a reasonable basis for believing that the rights were impaired as little as possible (despite the change it is still referred to as the minimal impairment component). This test involves two aspects. The first reflects the Supreme Court's concern about overinclusiveness. In other words, is the legislative net cast too wide in that it includes people or situations not necessary to achieve the objective of the legislation? The second reflects the Court's recognition that choosing among alternative schemes also means choosing which people may experience a limitation on their rights.

The Oakes requirement that a limitation on a guaranteed right must impair the right "as little as possible" has undergone significant change. I trace this change through five cases. This refinement of the requirement began with Edwards Books and Art Ltd. et al. v. The Queen; R. v. Nortown Foods Ltd. and Andrews. In both these cases the Court was faced with a challenge to legislation which embodied a choice among a number of policies which could be seen to be equally sustainable under the Charter. In the next case, Irwin Toy v. Québec (Attorney General), explained why the minimal impairment test was bifurcated into a strict standard where the state was a "singular antagonist" (as it is most criminal cases) and a relaxed standard where the states is acting

103. Supra, fn. 96, at p. 504.
105. Supra, fn. 28.
106. Supra, fn. 87.
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as a "mediator" to select policy options among competing choices.\textsuperscript{107} This bifurcation of the standard was maintained in \textit{McKinney}.\textsuperscript{108} In the final case I review on this matter, \textit{Tétrault-Gadoury v. Canada},\textsuperscript{109} La Forest J. implies that the relaxed test may have become even more relaxed.

In most cases in which disabled people challenge legislation or regulations under the \textit{Charter} it will be a challenge to the policy choice the government has made. In these circumstances it is clear the courts will be applying the relaxed standard of review which now applies to all challenges to the choice a government has made between competing options.

\textit{Edwards Books and Art Ltd. et al. v. The Queen; R. v. Nortown Foods Ltd.} was a case dealing with an Ontario Sunday closing law which generally required the closing of retail outlets on Sundays with exemptions for certain tourist areas and stores of a certain size with fewer than seven employees which closed the day before. Dickson C.J. introduced a change of inquiry for the minimal impairment component. Instead of requiring that the right be impaired "as little as possible" he asked "whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom."\textsuperscript{110} On the question of whether there was an alternative way of achieving the objective, Dickson C.J. said that none of the possible alternative schemes was clearly superior at minimizing the effects on employees and consumers especially considering that retail workers were most vulnerable to pressure from their employers to ignore their religious needs and work on the common pause day. In such circumstances the courts need only determine whether a legislative classification

\textsuperscript{107} Don Stuart, in \textit{Will S. 1 Now Save Any Charter Violation? The Chaulk Effectiveness Test Is Improper} (1991) 2 C.R. (4th) 107, argues the strict test for criminal cases may itself be undergoing a relaxation.

\textsuperscript{108} \textit{Supra}, fn. 14.


\textsuperscript{110} \textit{Supra}, fn. 104.
is reasonable. There must be evidence that the legislature made
genuine and serious attempts to minimize the adverse effects of pause day
legislation on Saturday observers. It is far from clear that one scheme is
intrinsically better than the other... The courts are not called upon to substitute
judicial opinions for legislative ones as to the place at which to draw a precise
line.\textsuperscript{111}\n
He concluded by finding that the scheme met this standard.

La Forest J., concurring, said Sunday closing laws require compromises and
balancing of interests which the courts are not equipped to handle. He concluded that
"[i]n the absence of unreasonableness or discrimination, courts are simply not in a position
to substitute their judgement for that of the Legislature."\textsuperscript{112}

Wilson J., dissenting in part, rejected, by implication, the notion of a relaxed
standard. She found the exemption clause offensive as it had the effect of respecting the
religious freedom of some but not all the members of the affected group. The clause did
not respect the group interest in the right - it distinguished between members of the group
without justification. She said the legislature must reach compromises on the basis of
principle: either the legislature must subordinate freedom of religion to the objective of a
common pause day or vice versa. She saw these as two competing schemes of justice and
would require the legislature to pick one and not compromise within either scheme. She
said the government failed to produce evidence that the exemption scheme was necessary
to achieve the legitimate objective of a common pause day.

In Andrews McIntryre and La Forest JJ. comment on the role of the court when the
legislature is faced with a choice. McIntyre J. said:

The role of the Charter, as applied by the courts, is to ensure that in applying
public policy the legislature does not adopt measures which are not sustainable
under the Charter. It is not, however, for the courts to legislate or to substitute
their views on public policy for those of the legislature.

I would say that the legislative choice in this regard is not one between an answer

\textsuperscript{111} \textit{Ibid}, at D.L.R. pp. 50-1.

\textsuperscript{112} \textit{Ibid}, at D.L.R. p. 75.
that is clearly right and one that is clearly wrong. Either position may well be sustainable and . . . the court is not called upon to substitute its opinion as to where to draw the line.113

La Forest J., in supporting the view that a flexible standard was required when assessing laws which embody social and economic policy decisions, said:

I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second-guess policy decisions.114

In *Irwin Toy Ltd. v. Québec (Attorney General)* the court dealt with provisions of a Quebec consumer protection law which banned advertising directed at children under the age of 13. The joint judgement of Dickson C.J. and Lamer and Wilson JJ. held that the provisions violated the freedom of expression guarantee found in s. 2 of the *Charter* but that the legislation was saved by s. 1. Since Wilson J. joined the judgement she seems to have relaxed her vigilance against any relaxation in the *Oakes* standard and adopted a "reasonable basis" standard of proof. The judgement said:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are means to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

. . .
The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

. . .
While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary

basis for the government's conclusions.\textsuperscript{115}

In \textit{McKinney}, La Forest J. explained the reason for the relaxed standard of review. He said that whether mandatory retirement impaired the right to non-discrimination was a difficult question but:

This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.\textsuperscript{116}

... The Legislature, like this Court, was faced with competing socio-economic theories, about which respected academics not unnaturally differ. In my view, the Legislature is entitled to choose between them and surely to proceed cautiously in effecting change on such important issues of social and economic concern. ... [T]he question for this Court is whether the government had a \textit{reasonable basis for concluding that the legislation impaired the relevant right as little as possible given the government's pressing and substantial objectives.}\textsuperscript{117}

Wilson J. described the reason for the relaxed standard in somewhat different terms. She said such a standard would be applied where alternative ways of achieving the objective were not clearly better than the one chosen by the legislature, the legislature had to balance rights of competing groups and, particularly, where the legislature was trying to promote or protect the interests of the less advantaged. Although she called it the "'vulnerable group' standard of review"\textsuperscript{118} her summary makes vulnerable group protection only one aspect of the standard. Be that as it may, she firmly rejected the use of the relaxed standard in \textit{McKinney}, saying that young professors are not vulnerable in the sense used in the previous cases.

In \textit{Tétreault-Gadoury v. Canada} there is a suggestion that the minimal impairment standard may be lowered one more notch. La Forest J., referring to \textit{McKinney} and \textit{Irwin}

\begin{itemize}
\item \textsuperscript{115} \textit{Supra}, fn. 87, at S.C.R. pp. 993-99.
\item \textsuperscript{116} \textit{Supra}, fn. 14, at p. 666.
\item \textsuperscript{117} \textit{Ibid}, at p. 669.
\item \textsuperscript{118} \textit{Ibid}, at p. 616.
\end{itemize}
Toy, said:

[W]hen evaluating legislative measures that attempt to strike a balance between the claims of legitimate but competing social values, considerable flexibility must be accorded to the government to choose between various alternatives. In such a situation, since the court cannot easily ascertain with certainty whether the least restrictive means have been chosen, it is appropriate to accord the government a measure of deference. 119

This accords with previous cases. However, La Forest J. went on to say: "Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down." 120 He then measured "the various stated government objectives [to determine] whether these objectives are achieved in a manner that reasonably could be believed to constitute a minimal impairment of the individual's rights" and found they were not. Despite his conclusion in this case, there would appear to be a real difference between determining whether the government "had a reasonable basis for concluding that the legislation impaired the relevant right as little as possible" and whether the government "had a reasonable basis for concluding that it has complied with the requirement of minimal impairment". This may be a semantic quibble but, considering that the Supreme Court has been fairly consistent in increasing its level of deference to the legislature ever since the Oakes decision, it is possible this signals a further decline in the Court's willingness to interfere with legislative choices.

The third component of the proportionality test has been essentially subsumed into the minimal impairment test. Professor Elliot argues that a balancing of the costs and benefits of the Charter violation, which used to be the third component of the proportionality requirement, is now an integral part of the minimal impairment branch of the test. He notes that "[i]his balancing, which is clearly evident in many of the court's

119. Supra, fn. 109, at p. 372.
120. Ibid, at p. 372.
Consideration of factors which may justify a limitation on a right guaranteed by the Charter takes place under s. 1. Such a limitation must be "prescribed by law" and be "demonstrably justified in a free and democratic society". The word "law" is narrowly construed for the purposes of s. 1. To be "demonstrably justified" the provision must relate to concerns which are pressing and substantial and the means must be proportional to the ends. Since this test was first stated in Oakes the vigour with which it is applied has been relaxed, especially in relation to social and economic legislation where the legislature has had to choose from among competing options, reflecting an increasing deference by the courts to the decisions of the legislatures. The pressing and substantial requirement has been transformed into a valid legislative objective test. The proportionality test is now composed of two elements: 1) that there be a rational connection between the means and the ends, and 2) that the legislature had a reasonable basis for believing the right was impaired as little as possible, including that there be a proportionality between the effects of the impugned measure and the objective of the measure.

There is no doubt that further refinement and changes in emphasis will occur to the Oakes test but it is clear the Supreme Court has had second thoughts about its earlier approach and decided that its exercise of judicial review must be tempered by the inherent philosophical problems of judicial review. Litigation is always a chancy business and asking a court to review legislation dealing with social and economic policy is no different. The various tests are so flexible that the outcome of any case depends on the individual judgement of each judge.

This increased level of deference bodes ill for the effective use of the Charter to challenge government activity in relation to issues of interest to the disabled community. Programs which advance the interests of disabled people are in direct competition for

121. Supra, fn. 10, 1992, at p. 25.
scarce resources. Furthermore, public policy in relation to disabled people is frequently a matter of a choice from among a set of options all of which have some proponents. These are the two factors which the court has used to explain and justify deference to legislative decisions.

As an example, in *Trofimenkoff v. Saskatchewan (Minister of Education)*, the applicant sought to challenge the government’s decision to close the School for the Deaf in Saskatoon and provide for the education of deaf children in the regular school system. The applicant argued that regular schools could not educate deaf children as well as the segregated School for the Deaf. Matheson J. held that there was no violation of s. 15 because the quality of education was not a matter which could be investigated under the guise of discrimination by law. Although one may argue that he was wrong to reject the claim at that stage, it is undoubtedly true that the decision to integrate children would be upheld under a s. 1 analysis. I do not think the courts will arbitrate disputes among parents and between parents and governments about how best to educate their children under the guise of s. 15 equality rights.

**E. Remedies under the Charter:**

In this section on remedies I will briefly review the two sections of the *Constitution* which relate directly to the remedial powers of the courts and then review in detail the remedies for unconstitutional legislation of severance and reading in and constitutional exemptions. The *Charter* does not affect the scope of the traditional remedies of damages, injunctions, declarations, and the prerogative writs which are most likely to be the remedies of choice to enforce accessibility rights. The remedies of severance, reading in, and constitutional exemption are, however, directly influenced by the presence of the

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_Charter_ and it is for this reason that I have selected them for discussion. These remedies are of great importance for many disability rights issues not only in cases where the legislation itself is discriminatory but also when the source of discrimination often lies not in the existence of a government program but in the restrictions and limitations on who can benefit from the program.

_Rodriguez_ 123 and _Fenton_ 124 are examples of claims that legislation itself discriminated against disabled people. An example of regulations which discriminate in terms of accessibility rights may be the various regulations related to the carriage of airline passengers. In all these cases the positive benefits of the legislation must be retained while making the necessary modifications to eliminate the discriminatory effects. For these types of cases the remedies of severance, reading in, and constitutional exemption are the ones which are most relevant.

Superior courts have always had inherent power to devise remedies which are appropriate to give effect to substantive rights. This power is limited only by express statutory provisions. 125 In addition to the inherent jurisdiction of superior courts, the Constitution contains two express remedial provisions: sections 24 and 52.

Section 24(1) states:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such

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123. *Supra*, fn. 5.


125. Dale Gibson, _The Law of the Charter: General Principles_, p. 839. An example of the exercise of this inherent power is seen in _Reference re Language Rights Under the Manitoba Act, 1870_[1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1. In this non-Charter case the Supreme Court of Canada declared all unilingual laws passed over the previous 95 years to be invalid. To avoid anarchy, the Court decreed that the laws would temporarily remain valid to give an opportunity to arrange for translation and re-enactment. The Court assumed authority for this remedy from the basic constitutional principle of the rule of law, which requires a body of positive law and public order to exist. The Court said that this was analogous to various state necessity doctrines which are invoked to maintain legal relationships in times of war, insurrection, or other special emergency situations.
remedy as the court considers appropriate and just in the circumstances.\textsuperscript{126}

This section gives a court of competent jurisdiction the widest possible discretion to formulate a remedy for the breach of a \textit{Charter} right. McIntyre J., in \textit{Mills v. The Queen}, said:

\begin{quote}
It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases and it is not for appellate courts to pre-empt or cut down this wide discretion. . . . [T]he circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.\textsuperscript{127}
\end{quote}

Section 24(1) restrains the court's discretion only by the requirement that a remedy be "appropriate and just in the circumstances".\textsuperscript{128} Bayda C.J.S., dissenting in part, in \textit{Saskatchewan Human Rights Commission v. Kedellas}, said:

\begin{quote}
The remedy under this section must possess both of the specified qualities: appropriateness and justness. Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself - a remedy "to fit the offence" as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation. The quality of justness on the other hand, has a broader scope of operation. It must fill a more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it.\textsuperscript{129}
\end{quote}

\textsuperscript{126} S. 24(2) provides the exclusive authority for excluding evidence obtained through a violation of the \textit{Charter} if, in the circumstances, its admission would bring the administration of justice into disrepute: \textit{R. v. Therens}, supra fn. 80.


As I have repeatedly indicated, a court of competent jurisdiction is free to employ the full discretion conferred on it by s. 24(1) of the \textit{Charter} in choosing a remedy for breach of the right to trial within a reasonable time. . . . The \textit{Charter} clearly tells us that the remedy to be given is that which "the court considers appropriate and just in the circumstances.

\textsuperscript{128} Peter W. Hogg, \textit{Constitutional Law of Canada} (2nd ed.), p. 694, states that all pre-\textit{Charter} remedies remain available and s. 24 is an extra source of remedial power.

\textsuperscript{129} (1989), 60 D.L.R. (4th) 143 at 162, 77 Sask. R. 94 (C.A.). Kedellas had made an application to prohibit the hearing of a Board of Inquiry into allegations he had sexually harassed an employee in violation of the \textit{Saskatchewan Human Rights Code} because of the three year delay between the time of the alleged events and the hearing. The application was refused in relation to the company he ran but was allowed, by the majority, in relation to the complaint against him personally. Bayda C.J. identified those who would be affected in this case as the complainants, the respondents, and the public at large. The interests of each must be weighed in determining if any particular remedy would be just. In this case, in refusing to approve the order prohibiting a Board of Inquiry from hearing the complaint, he was of the opinion that the interests of the complainants and the public outweighed the
Section 52(1) applies to the whole Constitution, including the *Charter of Rights and Freedoms*. It states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the consistency, of no force or effect.

In *R. v. Big M Drug Mart Ltd.* Dickson C.J. clearly distinguished the roles of subsections 24(1) and 52(1). The latter is express authority to strike down laws which are inconsistent with the Constitution while the former is authority to provide individual remedy for violations of *Charter* rights. In this case the court struck down the impugned legislation. Since no one can be convicted on the basis of an unconstitutional law, striking the legislation had provided a full remedy and it was unnecessary to refer to s. 24(1).

In *Singh et al. v. Minister of Employment and Immigration* and *Jones v. The Queen* Madame Justice Wilson said that if legislation is found inconsistent with rights under the Charter and is declared of no force or effect there is still a remedy under s. 24 to deal with any negative consequences the application of the law may have had on the individual. Thus, in her view, both s. 24 and s. 52 apply, each to make their contribution to remedying the violation of the Charter.

However, in *Schachter v. Canada* Chief Justice Lamer was much less inclined to use s. 24(1) to provide an individual remedy in conjunction with s. 52(1). In his view where s.52 was engaged only rarely would there remain some matter that required a remedy under s. 24(1). However, where the legislation itself is not unconstitutional but some action taken under that legislation did infringe a person's *Charter* rights s. 24(1) provides for an individual remedy. Lamer C.J. said

interests of the respondents. However, he suggested that alternative remedies may be available to minimize the adverse effects the delay in proceedings might have had on the respondents.

130. Supra, fn. 8.


An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.\(^\text{133}\)

This is a very restrictive approach. It implies that if, in the end, the challenge against the legislation is successful there have been no losses experienced along the way that need to be compensated. For example, a person subject to a period of imprisonment due to the application of an unconstitutional law should receive compensation. In the context of discrimination, if there is an intrinsic value in being free of discrimination, a victim of discriminatory legislation should be able to claim compensation. In \textit{McKinney} \(^\text{134}\) Wilson J., dissenting, would have declared the retirement policy inconsistent with the Charter and, in addition to other remedies, made an order for backpay under s. 24(1). The declaration alone would clearly not have been a full remedy for the losses suffered. It may well be that the Court is signalling what it will decide when it must determine whether a decision to strike a law has only prospective effect or whether it invalidates all decisions based on that law before the Charter came into effect.

i. Severance and Reading In:

Chief Justice Lamer's judgement in \textit{Schachter v. Canada} \(^\text{135}\) is the most recent and

\(^{133}\) [1992] 2 S.C.R. 679 at p. 720. See Lamer C.J.'s dissenting judgement in \textit{Rodriguez}, supra, fn. 5, for one of the rare times when he would have ordered a s. 24(1) remedy even after striking down the impugned legislation.

\(^{134}\) \textit{Supra}, fn. 14.

\(^{135}\) \textit{Supra}, fn. 133.
extensive discussion of the power of the Courts to fashion a *Charter* remedy.\(^{136}\)

The Constitution is the supreme law and s. 52 requires a court to strike down, "to the extent of the inconsistency", any law which violates the Constitution. Section 52 states that a "law" which is inconsistent with the Constitution is of no force or effect, not merely the words stating that law. The remedy is not dependant on the wording of the statute but its substance, which means that the inconsistency can be defined by what is wrongly excluded as well as by what is wrongly included. How to proceed will depend on the nature of the violation and the context of the legislation.

The courts have always had the power to strike down or sever (or "read down") laws to the extent necessary to eliminate unconstitutionality. Severance is used so as to interfere with the legislature as little as possible. Lamer C.J. noted that in general it is a matter of common sense that when most of a statute is constitutional the remainder should be allowed to stand. He also noted that severance is to be expected more under *Charter* than division of powers cases. This is because division of powers cases look to the "pith and substance" of the impugned law rather than the operation of its various segments.

The classic test of severability was set out by Viscount Simon in *A.G. Alberta v. A.G. Canada*:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.\(^{137}\)

This test is based on the principle that the legislature would have passed the constitutional remainder of the statute. Lamer C.J. noted that "[i]n some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative

\(^{136}\) The following discussion on severance and reading in is a summary of his judgement.

portions of the legislation which are not themselves unsound. 138

The Chief Justice emphasized the primary importance of legislative objective when determining the most appropriate remedy for a violation of Charter rights. The objective may be found from the words of the statute itself, from the evidence presented during the s. 1 inquiry, or by extrapolation from the means chosen to attain the objective. The courts must interfere with the objective of the legislature as little as possible. Where there are clear indications that the legislature has positively chosen one option from among many, or rejected an option which could be justified, the court should not impose that option. He said:

Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain. 139

For these reasons it is necessary to determine the nature of the inconsistency before deciding on the remedy. Lamer C.J. said:

Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion. 140

Since it is the substance of the violation, and not merely its form, that must conform to the Constitution, the Chief Justice said that reading in was as valid an option as severance in the proper circumstances:

This same approach (as severance) should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may

138. Supra, fn. 133, at p. 697.
140. Ibid, at p. 697.
be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.\textsuperscript{141}

Both reading in and severance are tools to avoid undue interference with the role of the legislature. Both courses of action are intrusive and it will require a careful case by case analysis to decide which may be the least intrusive in a particular case.

A second guiding principle in the formulation of remedies is respect for the purposes of the \textit{Charter}. Particularly in relation to s. 15 equality rights, the purpose has been identified as reducing disadvantage experienced by certain groups. He said:

\begin{quote}
Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put . . . Yet the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the \textit{Charter} and for s. 15 to have such a result clearly amounts to "equality with a vengeance," . . . While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the \textit{Charter}.\textsuperscript{142}
\end{quote}

Having approved of both severance and reading in as mechanisms for curing legislation which is inconsistent with the \textit{Charter}, Lamer C.J. set out a process for determining when severance or reading in would be the more appropriate remedial option.

To start it is necessary to define the extent of the inconsistency with the \textit{Charter}. How the law violates the \textit{Charter} and how it fails to be justified under s. 1 provide the basis for determining which option is more appropriate.

Where the law fails the first part of the \textit{Oakes} test, i.e. the objective is not pressing or substantial or is illegitimate, the most usual result is that the entire act in question must be struck down.

\textsuperscript{141} \textit{Ibid}, at p. 698. Lamer C.J. used the phrase "read down" as a synonym for severance.

\textsuperscript{142} \textit{Ibid}, at pp. 701-2. Lamer C.J. was referring to \textit{Attorney-General of Nova Scotia v. Phillips} (1986), 34 D.L.R. (4th) 633 in which the Court struck down a law providing benefits to single mothers in order to eliminate discrimination against single fathers.
Where the law fails the rational connection test, the general principle is that that portion of the act in question which fails the test must be severed, if severance is possible. Otherwise the entire act must be struck down.

Where the law fails the minimum impairment/effects part of the test the court has more flexibility in defining the inconsistency. The factors to consider are remedial precision, interference with legislative objective, the degree of change in the significance of the remaining portion, and the significance of the remaining portion.

In many cases severance allows a high degree of remedial precision. Reading in requires the court to select a policy choice among various options. Where the inconsistency cannot be corrected with a high degree of precision it is for the legislature to make the policy choice. Lamer C.J. said:

...[T]he Court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.\(^{143}\)

Any remedy will have some budgetary repercussions. Budgetary concerns cannot be used to justify a violation under s. 1 but they have an impact on remedy.

In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.\(^{144}\)

Another consideration is whether, when the offending portions are excised, the remaining portion is significantly changed so as to fundamentally alter the legislative scheme. In \textit{R. v. Morgentaler}\(^{145}\) the entire section on abortion had to be struck down because the offending part was essential to the "comprehensive code". The change that:

\(^{143}\) \textit{Ibid}, at p. 707.

\(^{144}\) \textit{Ibid}, at p. 709-10.

would have resulted from striking down only the offending subsection would have been so substantial that the assumption the legislature would have passed it in that form was "unsafe". In cases involving extending benefits to a group the relative sizes of the two groups may be relevant.

When the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers per se. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion.\(^{146}\)

The significance of the remaining portion, whether it existed in legislation for a long time, and whether the changes are "constitutionally encouraged" even if not mandated by it are factors which can assist in making the necessary assumptions as to whether the legislature would have passed the legislation as modified by severance or reading in terms. In conclusion, Lamer C.J. said:

> It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of legislature and the purposes of the Charter are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.\(^{147}\)

After the court has decided whether to sever or read in it must then decide, as a separate question, whether its decision should be temporarily suspended. The decision to sever or read in already has taken into account the question of which option is least intrusive of the legislature. Suspending a remedy means that a recognized violation of the Charter is allowed to continue. Lamer C.J. said that the primary issue in deciding whether to suspend is the effect on the public.

A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an

\(^{146}\) Supra, fn. 133, at p. 712.

\(^{147}\) Ibid, at p. 715.
opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R. v. Swain, [1991] 1 S.C.R. 933) or otherwise threatens the rule of law (Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.¹⁴⁸

ii. Constitutional Exemption:

Although an unusual remedy, a constitutional exemption may be made where a statute that is otherwise constitutional would be unconstitutional if applied to a particular person or class of persons or during the time of a temporary suspension of a decision to invalidate a law.¹⁴⁹ The terms used to describe this remedy are unclear and inconsistent.¹⁵⁰

In R. v. Videoflicks¹⁵¹ Mr. Justice Tarnopolsky held the Ontario Retail Business Holidays Act was generally valid but that it could not be applied to businesses operated by Orthodox Jews whose religion required them to, and who in fact did, close their


¹⁴⁹. Rodriguez, supra, fn. 5, per Lamer C.J., dissenting. In his judgement Lamer C.J. reviewed the Court’s comments on the availability of this remedy. Although it had not been required in any case to date the Court had frequently alluded to its availability in the rare cases where it would have been an appropriate remedy.

¹⁵⁰. Professor Gibson, supra, fn. 125, p. 327, uses the phrase "reading out" for this concept. Gary Bugeaud, in Extension as a Charter Remedy, (1991) 55 Saskatchewan Law Review 143 at p. 146, commenting on the apparently interchangeable use of the words "exception" and "exemption" says:

It is not clear whether "exception" and "exemption" mean the same thing, or whether exception refers to relieving one person from the effects of a burdensome statute while exemption refers to providing relief to a class of persons.

businesses on Sundays. Because the effect of the Act was to infringe their freedom of religion the court exempted this class from the legislation.

On appeal the majority of the Supreme Court of Canada held that the law did not violate the Charter. However, Mr. Justice Dickson did allow that the option of granting a "constitutional exemption" from otherwise valid legislation to "particular individuals whose religious freedom was adversely affected by the legislation" was possible.\(^\text{152}\) Madame Justice Wilson, dissenting in part, did not disapprove of Tarnopolsky J.A.'s approach but said:

> It appears to me, however, that where the impugned legislation is capable of severance, severance is the preferable route to follow. It avoids isolating the remedy to the particular litigant and provides relief to all those adversely affected by the unconstitutional provision. In a word, it preserves rather than fractures the integrity of the group.\(^\text{153}\)

Wilson J. and Tarnopolsky J.A. were looking at exempting a class of people from the legislation not just one individual or one event. Wilson J.'s preference for severance is explained by her interest in providing a remedy that promoted the Charter value of multiculturalism. She thought granting an exemption might cause disharmony within a protected group.

*R. v. Chief* was a case involving a trapper who had been convicted of assault with a weapon. The Criminal Code required that an order be issued that prohibited him from owning a weapon. The court determined that it would be cruel and unusual punishment to impose this order. McEachern C.J.Y.T. said of the individualized "constitutional exemption" he devised to avoid striking down a provision of the Criminal Code which was generally constitutional but not in respect to this accused:

> This may be a variant of the reading in/reading down doctrine, or a separate approach in its own right. In my view, it does not matter how it is classified...

\[\text{Exempting the accused from legislation which violated his rights was simply] a}\]
matter of the court selecting, from the armoury of remedies made available by s. 24 of the Charter, the remedy which will do justice in the instant case without damaging the general good. In Rodriguez Lamer C.J., dissenting, limited the availability of constitutional exemptions to the period in which the Court had temporarily suspended a declaration of invalidity. He said:

In this circumstance, the provision is both struck down and temporarily upheld, making the constitutional exemption peculiarly apt, and limiting its application to situations where it is absolutely necessary. The exemption is only available for a limited time, so that the Court is not put in the position of, in the words of Wilson J., curing "over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books". Nor is the Court put in the position of appearing to save a blanket prohibition in one respect while "dramatically altering it" in another by granting exemptions from that prohibition. The blanket prohibition is saved for reasons only of practical necessity, so granting exemptions where the necessity does not exist avoids the contradiction. Because I have held that the equality rights of all persons who are or will become physically unable to commit unassisted suicide are infringed, that description captures the class of persons to whom the constitutional exemption may be available; the class is not defined with reference only to Charter concepts and values.

The courts retain their traditional power to devise remedies appropriate to give effect to substantive rights. In addition, the Constitution, in ss. 24(1) and 52(1), provides wide discretion to formulate an appropriate remedy for a violation of the Charter. The interaction of s. 24(1) with s. 52(1) of the Constitution remains uncertain. The court has the power to sever portions of legislation and to read in terms to cure legislation which is inconsistent with the Charter in certain circumstances. In cases where legislation is generally valid but violates the rights of particular individuals a constitutional exemption may be allowed.


155. Supra, fn. 5.
F. Enforcing Rights: Choosing the Judicial or Human Rights System:

Both the Charter and human rights legislation prohibit discrimination because of disability. In some circumstances individuals will have a choice between initiating a Charter challenge through the courts or filing a complaint with a human rights commission. In this section I will explain when there is a choice between resorting to the courts or the human rights process to obtain a remedy for discrimination and review some of the factors which will influence that choice.

i. When Is A Choice Available?

Human rights legislation is expressly or impliedly paramount over all other legislation and binds the Crown. The legislation sets out the exclusive procedures for enforcement of the rights it protects. One may also challenge discriminatory "law", broadly defined, by invoking the Charter which is enforced through the courts. As was seen in chapter V the precise nature of the human rights procedure's powers to apply the Charter is in some doubt but for this discussion I will assume that a human rights board of inquiry does have the power to apply the Charter. In summary, when one is challenging legislation or government actions which amount to "law" for Charter purposes one has a choice between using the human rights procedures or the courts.

In Board of Governors of the Seneca College of Applied Arts and Technology v. Bhadauria Chief Justice Laskin, per curiam, held that there is no tort of discrimination nor does a right of action arise from a breach of human rights legislation. The reason for this lay "in the comprehensiveness of the Code in its administration and adjudicative
features, the latter including a wide right of appeal to the courts on both fact and law.\footnote{156} He concluded that "not only does the Code foreclose any civil action based directly upon a breach thereof, but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use."\footnote{157}

When section 15 of the \textit{Charter} came into effect it provided a new option for processing discrimination claims against the government. In \textit{Hines v. Nova Scotia (Registrar of Motor Vehicles) (No. 1)}\footnote{158} the plaintiff began an action against the Registrar of Motor Vehicles when his request for a drivers licence was refused because he had diabetes. He argued that his rights under s. 7 and s. 15 of the \textit{Charter} were being violated. Although the Nova Scotia Human Rights Commission could have accepted a complaint dealing with denial of the licence, Hines did not approach the Commission.

\footnote{156} \cite{citations-for-chapter-of-rights-and-freedoms}.

\footnote{157} \cite{citations-for-chapter-of-rights-and-freedoms}.

\footnote{158} \cite{citations-for-chapter-of-rights-and-freedoms}.


Recently there have been examples of unjust dismissal cases based on activities that would be violations of human rights law. For example, in \textit{Clark v. R.C.M.P.}, F.C.T.D., April, 1994, unreported, the plaintiff was successful in an unjust dismissal suit based on her forced resignation due to sexual harassment. \textit{Lehman v. Davis et al.}, 94 C.L.L.C. ¶14,014 (Ont. Ct. of Justice General Division), was an action for unjust dismissal which was pursued simultaneously with a human rights complaint of sexual harassment. In rejecting an argument that the plaintiff was limited to pursuing her human rights complaint, the Court said that human rights legislation does not replace employee common law causes of action but simply adds an option to address the wrong.

\footnote{158} \cite{citations-for-chapter-of-rights-and-freedoms}.
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The Commission intervened in the court case to argue that Hines should be required to proceed through the human rights system. The Commission argued that it had the requisite expertise, that the procedure before the Commission would be quicker and cheaper, that to not dismiss the application would encourage forum shopping, and that there were other cases before the Commission raising similar issues. In rejecting this argument, Davison J. said "[t]he right of any person to seek redress from any court of competent jurisdiction under [s. 24 of the Charter] is a fundamental right which cannot be thwarted lightly."\(^{159}\) He opined that "when one reads the preamble and recitals to the Human Rights Act\(^ {160}\) ... it does not appear to be the appropriate role for the Commission to attempt to preclude 'members of the human family' from the choice of how they wish to seek to enforce their rights at law."\(^ {161}\) He also noted that, although there was an overlap between the Charter and the Human Rights Act, the application also raised issues related to s. 7 of the Charter and arguments relating to natural justice and excess of jurisdiction by the respondent. He said: "It would be extremely detrimental to the applicant to require him to proceed with some remedies before this court and other remedies before the Commission."\(^ {162}\)

In Sniders v. Nova Scotia (Attorney General) the plaintiff had been mandatorily retired from his hospital job. The applicable human rights legislation did not apply to those over age 65. The Nova Scotia Court of Appeal declared that the sections of the Human Rights Act which limited the prohibition against age discrimination infringed the Charter and stuck them down. Having struck down the applicable sections of the legislation the Court then went on to find the mandatory retirement policy violated the

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160. S.N.S. 1969, C. 11, s. 1.
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*Human Rights Act* and ordered remedies pursuant thereto.\(^{163}\)

Two years after the *Sniders* decision enabled the Nova Scotia Human Rights Commission to deal with mandatory retirement two professors applied to the court for a declaration that the mandatory retirement scheme in their collective agreements violated the *Charter*. In *Jones v. Technical University of Nova Scotia* Nunn J. held that the *Charter* did not apply to private litigants and that the University was not government. However, he added his opinion that the proper forum for such cases was the Human Rights Commission. He said that since the *Sniders* decision:

> ...the constitutionality of the impediments to proceeding under the *Human Rights Act* by persons aged 65 or over are removed, and persons affected by any rules of mandatory retirement have a forum and procedures to assert their claims. Where such exists, as it does in this case, that is the proper forum. Were it not so, there would be a duplication of processes, forum shopping, and undoubtedly, a lessening of the authority and effectiveness of the procedures under the human rights legislation.

Human rights ... is obviously an area which requires supervision to assure that the rights created by legislation are meaningful and attained. This is best accomplished by a specialist board which is regularly available to anyone who has a claim to assert. As with other administrative tribunals, such a board is better able to deal, on a daily basis, with the matters within its jurisdiction. It, however, is always subject to the general supervision of a superior court.\(^{164}\)

Despite Nunn J.'s *obiter* in *Jones*, if there is discrimination contrary to the *Charter* it does not seem sensible that the courts would refuse to deal with a claim that a person's constitutional rights were being violated simply because of the availability of a human rights process.

In order to have a choice between the human rights process and the courts it is necessary for the human rights commission to have jurisdiction over the subject matter and the entity allegedly responsible for the discriminatory act and to be able to frame one's argument in *Charter* terms. This means that the respondent must be found to be


"government" and that the impugned action be a "law", if relying on s. 15, or violate some other section of the Charter.

ii. Making The Choice:

When a choice of forum is available, there are 8 major factors which will influence the decision to use the courts or the human rights process. These are: 1) whether there would be a different outcome, 2) cost, 3) the amount of control over the case the complainant wants to assume, 4) time limitations for filing complaints, 5) the time it takes to get a decision, 6) the degree of confidence in the expertise of the players, 7) the potential remedy, and 8) whether there are secondary objectives in filing the complaint.

The Supreme Court of Canada has said that the principles applied under human rights legislation are equally applicable to s. 15 of the Charter. The Court has also said that there is a similarity in purpose and method of analysis between human rights law and s. 15 of the Charter. The outcome of litigation is inherently uncertain but there seems to be no reason, based on the legal principles to be applied, why the outcome should be different whether one resorts to the Charter or human rights legislation. There is, however, too little jurisprudence to assert this proposition definitively. At this time other factors are more relevant when considering which process to use.

In those cases where there is a choice between using the human rights system or the courts the major deciding factor is usually cost. Although there are some private and public sources of funding, most people who wish to initiate a court challenge will not have access to these resources. In contrast, the human rights process is free to the

166. Dickason, supra, fn. 91.
Another factor is control and the sense of ownership of one's complaint. This includes formulating the scope of the claim, the collection and selection of evidence, the presentation of evidence to the adjudicator, and the formulation of argument. In the court system the parties instruct counsel. The degree to which the client and the lawyer collaborate on the various stages in a case depends on the people involved but clearly there is scope for the client to take an active role in the formulation and presentation of the claim.

In the human rights process, once the claim has been formulated, the complaint is owned by the Commission. Commission staff decide what information to collect at the investigation stage, how to collect it, and what to place before the Commissioners for the first level decision making (usually subject to an opportunity for the parties to make written submissions).

If the matter is dismissed by the Commission the parties will have little explanation of the reasons. An essential feature of the human rights system is the conciliation/mediation function. In many cases a settlement offer is made during investigation or conciliation. The Commission may choose to abandon a complaint if it thinks the offer is reasonable even if the complainant rejects it. In either case the only recourse is judicial review.

If the matter is sent to a Tribunal the Commission will adopt an approach it:

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167. In the unique model used in British Columbia the Council of Human Rights has made arrangements with the Legal Aid Society to provide lawyers to complainants appearing in front of the Member Designate who holds a hearing on the merits of the case if it is not dismissed at an earlier, administrative, stage.

168. British Columbia is the exception to this principle. In B.C. once the Council decides to appoint a Member Designate to hear the complaint the complainant is provided with a legal aid lawyer and they have full carriage of the complaint.

169. Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission) [1989] 2 S.C.R. 879. In Newfoundland a complainant may apply to the Trial Division of the Supreme Court for an order that the Commission refer a complaint to a board of inquiry (Human Rights Code, R.S.N. 1990, c. H-14, as amended, S.N. 1992 c. 48, s. 13, s. 21(4)).
consider to be in the public interest. This is usually the same as the interest of the complainant but this is not necessarily so. The Commission will choose what evidence to present, how to present it, what argument will be made, and what to recommend as an appropriate remedy. Complainants seldom have much involvement in the process except to give their testimony. A complainant who is dissatisfied with the approach of the Commission will have to represent him/herself separately from the Commission, which usually means hiring a lawyer to present the case in the way he/she wants it presented. There are no discovery provisions so the complainant will be constrained by the quality and type of evidence the Commission investigator gathered.

Unlike the human rights process in which most of the activity and decision making is done without the involvement or presence of the complainant, the court process is much more open. A complainant can choose a high level of involvement in the presentation of the case and can expect a reasoned decision.

There is no time limit on starting a Charter challenge. In contrast there is a time limit, ranging from six to twelve months from the date of the last discriminatory act, for filing under most human rights legislation, although many of the statutes allow the Commission discretion to extend the nominal time limitation.

Another aspect of time is the time it takes to obtain even a first level decision on a complaint. Although one of the rationales for the human rights commission system is that these are specialized administrative agencies which can reach decisions quickly, this expectation has been sorely disappointed. Delay without adequate explanation is endemic to the process.\textsuperscript{170}

Another factor to consider is the expertise of the various players in the two systems. The staff, commissioners, and adjudicators in the human rights system are supposed to have special knowledge, training, and experience in human rights issues. Once again,

\textsuperscript{170} Justice W.S. Tarnopolsky, revised by W.F. Pentney, Discrimination and the Law, 7\textsuperscript{th} cumulative supplement, at pp. 121, 133, and 149.
although this is the theory, it is not always true. In many jurisdictions no general rule of thumb can be depended upon to determine whether the court or the human rights commission is more sensitive to or capable of handling a human rights complaint. The confidence a person has in the expertise of the players in both systems remains a purely personal matter. In any case, the courts will give no curial deference to a human rights inquiry when interpreting the legal consequences of the facts as found by the inquiry.

Another factor to consider is that a suitable remedy may be not be available through the human rights process whereas the courts have almost unlimited power to fashion relief which provides a real remedy for the harm done.

A final point is that test cases often have a political as well as a legal objective. If a complaint is filed with the expectation that an adverse decision will prompt a political solution to the problem, a superior court decision almost certainly will have more impact on politicians than a human rights adjudication or an adverse decision by a human rights commission.\textsuperscript{171} The potential value of the complaint to a public policy debate or someone's political agenda will also influence whether a funding source will underwrite the cost.

At the end of the day, if there is a choice between the courts and the human rights system, the deciding factor will be cost. The outcome in any particular case of either process should, in theory, be the same.

G. Conclusions:

The \textit{Charter of Rights and Freedoms} has given the courts much greater power to review and, if necessary, to strike down or alter legislation. The primary restraints on the scope of judicial review are the concepts of institutional legitimacy and competence.

\textsuperscript{171} This factor reflects what Robin M. Elliot, in \textit{Developments in Constitutional Law: The 1989-90 Term}, (1991) 2 S.C.L.R. 83, has called the prompting and expressive functions of judicial review.
Because of the paucity of cases it is not yet possible to determine how suitable the courts are to deal with the competing interests involved in devising public policies which will advance the interests of disabled people.

Section 15 of the Charter is to be interpreted broadly to promote the equality rights of disadvantaged groups. Disability is one of the enumerated grounds of discrimination in s. 15. Disabled people are thus guaranteed the equality rights in s. 15 but the issue remains whether various claims will be encompassed in the scope of the rights guaranteed. A major limitation on the effectiveness of s. 15 is the decision that the section does not require governments to take positive action to promote equality.

The Charter applies only to legislatures and governments. How one determines the exact scope of "government" remains uncertain. However, the courts, taking an ad hoc approach to the problem, have signalled a somewhat restricted view of the scope of government and many entities which provide services to disabled people which are at arms length from the government will escape Charter scrutiny.

Section 15 guarantees equality in law without discrimination. The definition of the word "law" for the purposes of attracting s. 15 scrutiny is very broad and essentially applies to anything a legislature or government does. Discrimination has the same meaning as it does in human rights legislation and includes both direct and adverse effect discrimination. It is clearly recognized that treating everyone the same will often result in greater inequality just as treating people differently may. The measure of discrimination is whether the impugned measure imposes greater burdens or penalties on some groups. However, following on the decision that the Charter does not impose a positive duty to act, it remains necessary to find a comparison group against which to measure a demand for equality.

Section 1 of the Charter permits reasonable limitations on the rights guaranteed which are "prescribed by law" and which "can be demonstrably justified in a free and democratic society". For this purpose the term "law" is narrowly construed. The
impugned activity must have been expressly authorized by a statute or regulation, a common law rule, or arise by necessary implication from the operating requirements of the law. To determine whether a measure is "demonstrably justifiable" the courts have devised a two part test. The measure must relate to concerns which are pressing and substantial and it must be proportional to the ends. The components of this proportionality test are that the measure be rationally connected to the end, it should impair the right in question as little as possible, and the effects should be proportional to the end. This test has undergone substantial modification since it was first enunciated in *R. v. Oakes*. As the court has displayed a more deferential attitude to the legislature this test has bifurcated into a strict test in cases where the state is the singular antagonist of the individual and a much more relaxed test where the state is balancing competing interests.

The courts have the widest discretion in devising remedies for *Charter* violations, limited by the concerns about the proper scope of judicial review. The court has devised a process for determining when it is appropriate for the court to alter legislation which is inconsistent with the *Charter*, instead of striking it down. In rare cases the courts may grant constitutional exemptions to provide individual remedies for laws which are inconsistent with the *Charter* when applied to particular individuals.

The *Charter* is a potentially powerful tool to use to advance the interests of disabled people, particularly when the source of inequality is found in legislation. However, the Supreme Court has clearly pulled back from its early enthusiasm. In addition to the general tendency to more caution and deference to the legislatures, disability public policy as embodied in legislation is very much a matter of choosing from among options, sometimes none of them completely satisfactory, and choosing from among competing demands for resources. The courts are clearly most hesitant to interfere with legislation passed in this context. There is insufficient jurisprudence on disability issues to date to reach a firm conclusion but in my opinion *Charter* litigation will have a minimal impact on the disability agenda.
Human Rights legislation has a mixed record for creating real change. In my view it has been most effective in helping individuals who have been discriminated against in employment on the grounds of sex and physical disability. In addition, it has caused major changes in the policies of employers as much by its political influence as its legal clout. However, human rights legislation has failed to deal with widespread systemic discrimination against women, racial minorities, and disabled people. In particular it has been strikingly ineffective in dealing with accessibility rights.

Before making suggestions for how accessibility rights might be better enforced I will review, in the next chapter, the American experience with the major federal disability statutes.
VII. U.S. Legislation Respecting Disability Rights:

The United States federal government's anti-discrimination initiatives in relation to disabled people have been pursued through prescriptive statutes, funding statutes, and contract formation. Since I am interested in the U.S. experience for its implementation strategies I have organized this chapter by those strategies. In order to illustrate these strategies I have selected for review the three major statutes which form the basis of U.S. federal public policy in this area. These statutes are the Rehabilitation Act, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act, 1990.

The Rehabilitation Act illustrates each of the three strategies. This Act deals with all aspects of federal government services for disabled people from vocational rehabilitation, through financial aid for long term care, to the anti-discrimination provisions of title V which is the title dealt with in this chapter. The first part of title V requires the federal government to establish an Interagency Committee on Handicapped Employees to review employment practices related to disabled employees and applicants, to develop affirmative action programs for the employment of disabled people, and to develop procedures for state agencies to facilitate the employment of disabled people. The next part establishes the Architectural and Transportation Barriers Compliance Board which is the enforcement agency for the Architectural Barriers Act. The next part establishes a requirement that all contracts made with the federal government over a certain dollar amount must contain a clause requiring the contractors to set up an affirmative action plan for the employment of disabled people. The last part prohibits

1. 29 U.S.C. §§790 et seq.
2. 20 U.S.C. §§1401 et seq.
3. 43 U.S.C. §§12101 et seq.
4. 42 U.S.C. §§4151 et seq.
discrimination against disabled people by any agency receiving federal financial support. It is this requirement that enables the federal government to influence the actions of private and state agencies otherwise subject to the jurisdiction of the state governments. In this chapter the various parts of this Act have been rearranged and are discussed in the context of the particular implementation strategy.

The Individuals with Disabilities Education Act is an example of implementation by financial control. This Act sets out the standards which must be met by those education authorities which receive federal financial support for the education of exceptional children. Since the financial reality is that all school boards must have federal aid to meet state constitutional duties towards these children, the federal government is able to impose public policy options which it has chosen. The three policy options which the Act imposes are the concepts of "zero reject", "mainstreaming", and "individualized education programs".

The Americans with Disabilities Act, 1990 extends the scope of the Rehabilitation Act. This Act applies to the federal and state governments and private entities subject to federal jurisdiction. Title I prohibits discrimination against disabled people in employment. A duty of reasonable accommodation is imposed which specially refers to a requirement to make physical alterations so that structures are "readily accessible to and usable by" disabled people and a requirement to take actions such as modifying work schedules and providing assistive aids and readers or interpreters. This duty is subject to the proviso that the accommodation not impose an "undue hardship on the operation of the business". Title II prohibits discrimination in employment and the provision of services by state and local governments and a number of public transportation authorities even if they do not receive federal financial aid. The bulk of title II details specific requirements for various types of public transportation authorities. Title III prohibits discrimination against disabled people by privately operated "places of public accommodation" and privately owned public transportation systems. A duty of
reasonable accommodation up to the point where such accommodation becomes an "undue burden" is imposed. Title III introduces the new concept of requiring covered entities to take action which is "readily achievable" to promote accessibility rights. This standard focuses on the ease with which the entity could take the action. New construction, however, must meet a standard of being "readily accessible to and usable by" disabled people. This standard focuses on the interests of the disabled person in using the facility. The rest of the title is taken up with specific requirements which transportation companies must meet. Title IV requires telephone companies to set up telephone relay services for hearing impaired individuals and the closed captioning of public service announcements. With the exception of title IV, which is enforced by the Federal Communications Commission, the ADA is enforced by the mechanisms set up to enforce the Civil Rights Acts which prohibit race and sex discrimination.

The purpose of this chapter is two-fold. Although the existence of the leading American statutes is widely known in the Canadian disabled community, the content of those statutes is much less so. Furthermore, there is a general sense within the community that these statutes are models which Canada should emulate because, it is felt, they more aggressively promote the interests of disabled people. However, in fact their effectiveness has been seriously questioned in the United States and, particularly with the ADA, a lot of their content is taken up with limitations and controlling mechanisms which restrict their general non-discrimination principles. Adoption of the American approach holus-bolus would be a grave mistake for the disabled community in Canada. The first purpose, then, is to provide a brief and simplified outline of the provisions of the Rehabilitation Act and the Americans with Disabilities Act, 1990.

One of the major weaknesses of Canadian disability rights policy is the lack of understanding of, or agreement on, the extent of the rights of disabled people. The second purpose of this chapter is to identify the various policy options which delineate the extent of the rights guaranteed by U.S. legislation.
Current disability public policy in the United States is based on the principles of the civil rights movement. In 1973, during the course of amendments to the Rehabilitation Act, proposals were made to add a non-discrimination clause as a last title to the Act. The addition was modeled on existing laws prohibiting discrimination because of race and sex. The style of protection for disabled people took this form because the policy innovators were familiar with civil rights law. The passage of civil rights styled non-discrimination legislation went relatively unnoticed even within the disabled community. Several years passed before the disabled community was familiar enough with the potential of the legislation to become galvanized into action to pressure the government to begin implementation of the legislation.

The most recent policy choices have been enacted in the Americans with Disabilities Act, 1990. U.S. legislators and regulators have, in this legislation, spelled out in detail the nature of the right to non-discrimination and the limitations on that right. The legislation is detailed and complex; the regulations are extensive and thorough. But, in consequence, the regulated have a much firmer idea of what is expected of them than any Canadian could have. The Canadian model in every jurisdiction has been to specify as little as possible in the legislation and see what happens.

U.S. federal disability legislation is directed at the group interest of ending the economic and social marginalization of disabled people. In consequence, transitory illness or minor variations from the human norm will not attract the protection of the Act. The individual interest in not being discriminated against because of these factors is not protected. This is precisely opposite to the Canadian approach of protecting individuals


7. Bonnie R. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities*, p. 4:11. The definition of handicap was designed to ensure that only people with "significant impairments" would be protected from discrimination.
from arbitrary discrimination because of physical condition\(^8\) as well individuals with significant disabilities.

The *Rehabilitation Act* was amended in 1974 to clarify the interests the statute was meant to protect. Section 505 was added to define an "individual with handicaps" as:

\[
\ldots \text{any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.} \ldots
\]

"Major life activities" are defined differently in the various sets of regulations issued under the *Act* but the differences are all variations on the themes of caring for one's self, performing manual tasks, walking, seeing, hearing, talking, learning, and working.\(^9\) The Equal Employment Opportunities Commission (EEOC) guidelines specify that a person is disabled within the meaning of the *Act* even if the use of a prosthesis, drugs, or other treatment or aids makes normal activities possible.

Having a history of such a condition or being subject to the perception of having such a condition also attracts protection, which follows logically from the objective of the legislation which is to put an end to discrimination based on prejudice against and stereotyping of disabled people.

Cases under the *Rehabilitation Act* have interpreted the phrase "substantially limits" as requiring that a person needs to be "likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." A person who has a

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8. The term "physical condition" is used to show that "disability" in most Canadian jurisdictions is interpreted to mean any variation from the ideal human norm. For example, a person with a visual acuity of 20/20, 20/30 who has been rejected by a railway as an engineer for that reason will be considered "disabled" for the purposes of the legislation. In Gary S. Marx and Gary G. Goldberger, *Disability Law Compliance Manual*, at p. 2-46, it is recognized this is a theoretical interpretation of the "regarded as" prong of the test but the authors say that the courts and the EEOC regulations have rejected it, and they indicate that it is unlikely that the ADA will change this.

9. 29 U.S.C. § 706(8)(B). Excluded from coverage, in relation to employment, are alcoholics and drug abusers whose current usage constitutes a "direct threat" to the health and safety of others. Paragraph C excludes those who have a contagious disease which constitutes a "direct threat" to the health and safety of others or who are unable to perform the duties of the job because of the disease.

10. See for example, 34 CFR 104.3(j)(2)(i)-(iv).
transitory condition which does not leave any permanent adverse effect or has a condition which limits the person from a specific job or a very narrow range of jobs is not handicapped within the meaning of the Act. Although it is not settled whether this same restriction will apply to the ADA, the definition of disability in the ADA is similar\(^{11}\) and the ADA is clearly based on Rehabilitation Act jurisprudence.\(^{12}\)

The key element of "impairment to a major life activity" excludes people who have minor physical impairments or suffer minor or temporary illness from protection against discrimination because of those conditions.\(^{13}\) This focus protects the group interest and directs attention to the social problem which the legislation was designed to deal with but leaves no remedy for those who are arbitrarily adversely treated because of medical conditions not covered by the legislation.

The ADA does not clarify if one is disabled if only restricted from a specific or limited range of jobs. The Rehabilitation Act regulations follow the approach set out in *E.E. Black Ltd. v. Marshall*,\(^ {14}\) and a consistent line of cases following, which considered the number and types of job which the person could not do, restrictions in the geographic area, job expectations and training, generally used occupational criteria and qualifications, and the types of jobs for which the person would apply in determining if

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11. S. 3(2) of the *Americans with Disability Act of 1990*, 42 U.S.C. 12102(2), which defines "disability" for the purposes of the Act, states:
   - The term "disability" means, with respect to an individual
     - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
     - (B) a record of such an impairment; or
     - (C) being regarded as having such an impairment.

   Sections of title V of the ADA modify this definition, and the one in the Rehabilitation Act, to exclude from, or limit, protection for drug users, people with a number of psycho-sexual conditions and compulsive behaviour syndromes, bisexuals, and homosexuals.


13. Although temporary disabilities which leave no long term residual effect, such as broken limbs, are not covered, administrative guidelines and court cases indicate that a temporary condition may be covered if it is of sufficiently long duration and substantially limits major life activities while it lasts. Each case is to be decided on its merits. The ADA does nothing to clarify this issue. (Marx and Goldberger, *supra*, fn. 8, at pp. 2-27-9.)

the person was substantially limited in a major life activity (i.e. employment).\textsuperscript{15}

The determination of whether a person is a "qualified handicapped person"\textsuperscript{16} is to be assessed after allowance has been made for providing the individual with the reasonable accommodations necessary to permit enjoyment of the benefit or employment.\textsuperscript{17} However, the assessment of whether a person is disabled is to be made without regard to aids or medical treatments which reduce or eliminate the functional effects of the impairment.

A. Implementation by Contract:

The model for implementing disability policy by contract comes intact from U.S. experience with race discrimination. In 1941 President Roosevelt issued an executive order that every defense contract contain a clause prohibiting discrimination because of race, colour, creed, or national origin. President Kennedy, in 1961, by executive order, added a requirement for a clause compelling contractors to undertake affirmative action programs directed at racial minorities.\textsuperscript{18}

Section 503\textsuperscript{19} of the \textit{Rehabilitation Act} is based on this system. It provides that contractors and sub-contractors which have contracts exceeding $2,500 with the federal government must take affirmative action to hire and promote "qualified individuals with

\begin{itemize}
  \item Marx and Goldberger, \textit{supra}, fn. 8, p. 2-29 et seq.
  \item See \textit{infra}, fn. 26, \textit{Rehabilitation Act}, 29 U.S.C. §794. The \textit{Americans with Disabilities Act}, 1990 uses the term "qualified individual with a disability" and employs a number of different formulae to convey the notion that this is to be assessed after reasonable accommodations have been made.
  \item 29 U.S.C. § 793.
\end{itemize}
Regulations under s. 503 provide a standard affirmative action clause for all federal contracts which sets out the affirmative action requirements. This clause requires action to remove artificial barriers to employment, policies on reasonable accommodation, internal communications, and outreach efforts to recruit, hire, and promote disabled people. If the contractor has more than 50 employees or a contract greater than $50,000 it must create and maintain a written affirmative action plan, which is to be annually updated and publicized within the organization. To this extent they are very similar to the requirements for affirmative action plans to deal with race and sex discrimination. However, unlike these latter plans, the s. 503 regulations do not require goals, timetables, or quotas. The affirmative measures requirements only apply to those who self-identify or whom the employer/contractor knows to be disabled.

The section itself gives no rights directly to individuals nor does it create a duty on the contractor. It just creates a duty on the federal government to make and enforce contracts containing the required affirmative action provisions. Section 503 is monitored by the Office of Federal Contract Compliance Programs (OFCCP) which is responsible for undertaking compliance reviews of the affirmative action plan, accessibility of the premises, and the efforts made to recruit disabled employees.

The only avenue of remedy is to file a complaint with the Department of Labour (DoL), Office of Federal Contract Compliance Programs (OFCCP) within 180 days of

20. Section 503 speaks only of taking affirmative action to employ and advance handicapped individuals. But the regulations require that a clause prohibiting discrimination against employees or applicants because of handicap in recruitment, selection, promotion, or terms and conditions of work be included in every contract: 41 C.F.R. §60-741.4 (1989). Likewise, although the statute does not mention a requirement for reasonable accommodation it is implied by the affirmative action mandate and required by regulation: 41 C.F.R. §60-741.6(d).


the alleged violation. If the employer has an internal review procedure a complaint must be initially referred to that procedure. If there is no such procedure, or the matter is not resolved within 60 days, the OFCCP must investigate and attempt to resolve the matter through conciliation and persuasion within a reasonable time - acting as a mediator between the parties to achieve a reasonable settlement. The contractor will be considered in compliance if it meets the commitments made in the conciliation agreement.

If no settlement is possible a formal hearing is held. If a violation is found the DoL may order the contractor to follow the s. 503 regulations, file suit against the contractor in federal court to obtain appropriate injunctive relief, withhold payments, terminate all or part of existing contracts, or bar the contractor from receiving future contracts.

An individual dissatisfied with the OFCCP resolution may file suit against the DoL for judicial review of a decision to close a complaint file. The court only has jurisdiction to return the case to the DoL for reconsideration if the DoL's actions were arbitrary or capricious.

B. Implementation by Financial Control:

Of the various statutes which are intended to implement disability policy through federal funding provisions I have selected the Rehabilitation Act and the Individuals with Disabilities Education Act for review. These two statutes were selected because of their notoriety and because they illustrate two approaches to implementing public policy by this type of legislation.

23. Although some courts have allowed a right of private action for a violation of s. 503, the vast majority have refused to recognize a right of private action.

24. Some courts have held that a decision not to file suit is a nonreviewable exercise of agency discretion (Marx and Goldberger, supra, fn. 8, p. 1-19).

i. The *Rehabilitation Act, 1973*:

When first enacted, section 504 of the *Rehabilitation Act* was designed to enhance the employment opportunities of disabled people. Amendments in 1974 removed the employment limited definition of "handicapped individual" and further amendments in 1978 bound the federal government as well as recipients of federal financial assistance to the non-discrimination mandate of s. 504.

Section 504 of the *Rehabilitation Act* now provides:

No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 26

Section 504 is prescriptive in relation to the federal government. 27 It does not require any other entity to do anything unless it is receiving federal government funds. State and local governments and private entities are controlled to the extent they wish to use federal money.

With this proviso, the reach of s. 504 is extremely broad, affecting private, non-profit, and state entities. 28 It includes education (most school districts, colleges, and universities receive federal aid), employment (employers receiving federal job creation funding or other aid), transportation agencies and companies, and health, welfare and social services, all of which receive substantial federal aid. The federal financial assistance may be provided directly or indirectly which means that entities which receive passed on

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27. Section 504 must be read in conjunction with s. 501 in relation to employment with the federal government. However, in its capacity as a direct service provider the federal government is bound only by s. 504.

28. See the *Civil Rights Remedies Equalization Act, 1986*, 42 U.S.C. § 2000 d-7, reversing a U.S. Supreme Court decision that s. 504 of the *Rehabilitation Act, 1973* did not override state immunity to federal laws as provided in the eleventh amendment to the Constitution.
money, like municipal governments, are covered as long as the final recipient was an intended recipient. Federal financial assistance includes funds, the services of federal personnel, and the use of real and personal property controlled by the federal government. It applies to the entire entity receiving federal financial assistance not just the specific program or activity which receives those funds.  

The regulations spell out in detail that the recipient of federal funding cannot discriminate in relation to employment. Although there is some debate, it seems that the funding does not have to be granted for the primary purpose of creating employment. It is sufficient that the recipient must employ people to attract the attention of s. 504.

The first point of interest is the organizational structure used to implement s. 504. The statute requires one government agency to issue regulations setting out minimum standards which must be used by other government agencies which are directly responsible for granting federal funds in the development of their regulations. In addition, enforcement of these regulations is the responsibility of the granting agency, although the lead agency is responsible for coordinating enforcement. When the federal government was brought under the Act a separate set of regulations was issued to cover the delivery of government programs.

The second point of interest lies in the nature of the regulations. The brevity of the statutory language gave the drafters of the regulations the scope to select from various options how the section would be interpreted.

In relation to the employment mandate, the regulations imposed the policy of

29. See the Civil Rights Restoration Act, 1988, 29 U.S.C. §794, which was passed to reverse certain U.S. Supreme Court decisions restricting the application of federal race discrimination laws to only those parts of an entity which used the federal funds.

30. In 1976 the President instructed the Department of Health Education and Welfare to issue regulations and coordinate federal enforcement efforts. However, a change in administrations brought a new Secretary of the Department who, in essence, required a total review of all concepts involved. It was only in January 1978, after litigation by a disability interest group, that the Department of Health, Education and Welfare issued minimum regulations setting out minimum standards for enforcement of s. 504. Since then, some 55 federal agencies have issued the required regulations. In 1980 responsibility for coordinating and implementing s. 504 was transferred to the Department of Justice.
"reasonable accommodation". A handicapped person was defined as "an individual who, with reasonable accommodation, can perform the essential functions of the job in question." The requirement for reasonable accommodation was limited, or balanced, by the requirement that the accommodation not impose an "undue economic burden".

The regulations related to physical access to services contain two different policy choices. The first, to deal with programs delivered from existing buildings, is the concept of "program accessibility". This concept is the balancing mechanism for the competing interests of disabled people to equal access and the service providers' concern about costs. The concept of program accessibility requires that the recipient ensure its programs, when viewed in their entirety, are "readily accessible to and usable by" disabled people. It does not require modification to all the recipient's existing buildings and structures to make them accessible. Thus, structural modifications are not required if other accommodations can be made such as rescheduling classes, service delivery in accessible locations, or home visits. A recipient need not take action to provide access that would pose an undue financial or administrative burden or that would fundamentally alter the nature of the service, program, or activity. In considering possible accommodations the recipient must ensure that the service is provided in the most integrated setting possible (given that the primary location is not being made accessible). Once again, it is of interest that the regulations which apply to the federal government limit the concept of program accessibility by specifying that it is only required if the necessary actions do not represent a "fundamental alteration" in the program or an undue financial burden.

31. 42 Federal Register 22680.
32. S. 504 does not apply to federal government employment. As the Advisory Commission on Intergovernmental Relations, in its study Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal, p. 34, noted, the s. 501 regulations which prohibit the federal government from discriminating against disabled people in employment do not mention any requirement for reasonable accommodation.
33. 28 C.F.R. §41.57(a)(1989) - DoJ Regulation.
34. Supra, fn. 32, p. 35.
In contrast, a second policy choice applies to new and renovated buildings. Newly constructed buildings must be built so as to be "readily accessible to and usable by handicapped persons". Alterations to buildings must "to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons."\(^{35}\)

In 1978 the Rehabilitation Act was amended\(^ {36}\) to provide that the enforcement mechanism and remedies provided for in title VI of the Civil Rights Act, 1964\(^ {37}\) would apply to the enforcement of s. 504.

The various regulations issued by the funding agencies frequently impose on the recipient agencies the requirement to provide a grievance process with due process safeguards to resolve complaints. However, failure to exhaust these procedures will not prevent the filing of a complaint with the federal agency providing the funding.

Section 504 may be enforced by one of three mechanisms: the funding agency may initiate an action, an individual may file a complaint with the funding agency, or an individual may initiate a private action in the courts.

The Office of Civil Rights (OCR) of a funding agency may initiate administrative enforcement procedures against a recipient entity to enforce s. 504. Enforcement efforts are implemented and coordinated by the U.S. Attorney General.

In addition, an aggrieved individual may file a complaint with the OCR of the federal agency responsible for funding the entity. In either case, the administrative procedures are between the donor and recipient agency: there is no role for the individual complainant. The OCR must promptly investigate and attempt informal resolution. Where this does not resolve the complaint the OCR will convene a formal hearing. The

35. 28 C.F.R. §41.58(a)(1989) - DoJ Regulation.
37. 42 U.S.C. §2000d-6, which prohibits discrimination because of race by recipients of federal funds. The following discussion is based on Rothstein, supra, fn. 17, pp. 66 et seq., and Tucker and Goldstein, supra, fn. 7, p. 3.
complainant may be given notice of this hearing, but is not a party to the proceedings. The final decision of the hearing officer is subject to judicial review.

Although s. 504 is silent on whether there is a right to a private action every court has held there is. Because the individual is not a party in the administrative proceedings and they do not provide effective individual relief, exhaustion of the administrative remedies is not required. Private individuals can sue the recipient entity for breach of s. 504 but cannot sue the donor agency for failure to investigate breaches of, or to enforce, s. 504 regulations.

The only administrative remedies are termination, suspension, or deferral of federal funding. However, such remedies are clearly unsatisfactory for an individual complainant objecting to a violation of his/her rights. Although injunctive relief is not mentioned in the statute or regulations, most courts have accepted that injunctive relief is available. The existence of damages as a remedy and the type of damages which may be award is still unsettled. It is the power of the superior courts to order injunctive relief that provides an effective remedy for individuals. The court can order the recipient agency to take action, or refrain from a course of action, to give effect to the non-discrimination right.

ii. The Individuals with Disabilities Education Act (IDEA):

38. The courts originally held that individuals could only sue if the federal funding was designed to create employment. Even though the courts still recognize that s. 504 is designed to improve the employment opportunities of disabled individuals the current view is that a person can file suit about employment discrimination regardless of the purpose of the federal funding. (Tucker and Goldstein, supra, fn. 7, at p. 3:4.)

39. For example, in Eastern Paralyzed Veterans Association of Pennsylvania, Inc. v. Metropolitan Transportation Authority et al., 433 NYS2d 460 (1980), the court held that s. 504 did not create a private right of action to compel a federal agency to withhold funds from an alleged non-complying recipient. One of the few cases to the contrary is Greater Los Angeles Council on Deafness, Inc. v. Baldridge, 827 F.2d 1353 (9th Cir. 1987), in which the court granted an order of mandamus to compel the Department of Commerce to rule on a complaint about the lack of captioning by a public television station.

40. The Civil Rights Act of 1990 clarifies some of this confusion by providing that compensatory and punitive damages may be awarded in cases of unlawful intentional discrimination, except where the respondent shows good faith efforts to make reasonable accommodation. The legislation also, for the first time, places caps on the amount of compensatory damages which can be awarded. Where there is a claim for compensatory or punitive damages either party can insist on a jury trial.
The Individuals with Disabilities Education Act (formerly known as the Education for All Handicapped Children Act) is another example of a funding statute. It deals with disabled children from birth to age 21 who need special education services. The fact of disability is not enough: there must be a disability which creates a need for special education. (Section 504 of the Rehabilitation Act and the regulations issued by the Department of Education cover all disabled children whether or not they need special education services.)

The IDEA provides specific educational rights for disabled children. To implement these rights the statute takes the form of a federal funding statute which sets out detailed rules for states to follow when providing disabled children with a "free appropriate public education" if the state is to receive federal financial assistance. In addition to practical concerns, there are constitutional pressures which compel states to used federal funds for education. All state constitutions require the provision of a free public education for children and the fifth and fourteenth amendments make it unconstitutional to discriminate against disabled children. To meet their constitutional responsibilities the states must have the federal money. They are in effect forced to implement the IDEA.

Unlike s. 504, the policy choices related to the education of a disabled child requiring special education are specified in the Act itself. The three policy principles which inform the design and intent of the Act are: 1) "zero reject" (that all children, regardless of disability, can benefit from education, 2) that everyone has the right to a "free and appropriate education" in the "least restrictive environment" (mainstreaming), and 3) that schools develop an "individualized education program" for each disabled child. The Act also sets out an extensive set of due process requirements when school decisions to exclude a child from, or include a child in, the regular school system are challenged.

42. Rothstein, supra, fn. 17, p. 15.
43. Rothstein, supra, fn. 17, pp. 13 et seq.
These include the right of parents to be represented, to obtain the record of their child, and to written findings of fact and decisions; the right of the child to be present at all hearings; and the right to have hearings open to the public. 44

A parent in dispute with the local school board may insist upon a due process hearing. This hearing is usually held at the local level but there are states which assign the initial hearing to the state education agency. Many states have inserted a compulsory mediation step before a formal hearing is convened. A decision must be made within 30 days of the request for a hearing. A party dissatisfied with the results of the initial hearing may appeal to the state education agency.

The statute specifically provides for a right of private action in state or federal courts. A party dissatisfied with the results of the state agency’s review may file suit. The court may hear additional evidence and make an order it considers appropriate. 45

Although the statute provides for a right of private action, it appears that an aggrieved individual must exhaust administrative procedures unless to do so would be futile (e.g. where the state due process requirements violate the IDEA), there is a claim for damages (which the hearing officer cannot grant), or where the due process procedures cannot adequately deal with the issues. 46

Three differences between s. 504 and the IDEA can be identified. First, s. 504 is given content by regulation, whereas the IDEA statute includes the organizing principles which define the nature and scope of the rights guaranteed. Second, s. 504 regulations are issued by each of the funding agencies with a lead agency issuing regulations establishing minimum standards for departmental regulations. There is clearly a potential for


45. Although termination of federal funding is specifically allowed under the IDEA such a remedy would be a pyrrhic victory. The court may grant injunctive relief; it is unsettled whether damages may be awarded. (Rothstein, supra, fn. 17, pp. 71 et seq.)

46. Ibid., p. 69.
conflicting regulations. The IDEA regulations are issued by one federal agency. Third, the IDEA gives a much greater role to state authorities to initially resolve disputes about its implementation. In contrast, s. 504 enforcement, even when against state agencies, remains a federal preserve.

C. Prescriptive Statutes:

i. The Rehabilitation Act:

I have already discussed s. 503 of the Rehabilitation Act as an example of a statute implementing public policy by the control of contracts and s. 504 as an example of control by funding. In this part I will review the prescriptive elements of the Rehabilitation Act which relate to federal government employment and architectural barriers.

a. Section 501:

Section 50147 establishes a federal Interagency Committee on Handicapped Employees to review the adequacy of employment practices in relation to handicapped applicants and employees and requires federal agencies to establish affirmative action programs for the employment of handicapped people (which must include hiring, placement, and promotion), develop procedures for state agencies to facilitate employment of handicapped people, and submit yearly progress reports to Congress.

As with s. 503, the affirmative action requirements of section 501 are specified in regulations.48 They require outreach efforts to recruit and hire disabled people and to

47. 29 U.S.C. §791.
48. 41 C.F.R. § 60-741.4.
promote employees but they do not require goals, timetables, or quotas. The requirements only apply to those who self-identify or whom the employer knows to be disabled.

In the beginning s. 501 was implemented by the Civil Service Commission. The Commission issued regulations based on existing regulations dealing with race and sex discrimination. These regulations explicitly prohibited discrimination against disabled people and required the government to reasonably accommodate disabled applicants and employees short of undue hardship.

As part of an executive reorganization, the Equal Employment Opportunities Commission was given responsibility for implementing s. 501 in 1978. In that same year the Rehabilitation Act was amended by adopting the enforcement mechanisms and remedies provided for in title VII of the Civil Rights Act, 1964. The amendments also explicitly provided for a private right of action after exhausting the administrative remedies.

The Equal Employment Opportunities Commission is the federal agency charged with responsibility for implementing title VII of the Civil Rights Act, 1964. There are two administrative procedures: one for complaints against the federal government and one for all other complaints.

Except for complaints against the federal government, which I will deal with later,

49. The EEOC issued a government Management Directive in 1983 that required agencies with more than 500 employees to establish quantitative goals and to emphasize employment of individuals with "targeted disabilities". These targeted disabilities include deafness, blindness, degrees of paralysis, development delay, and mental illness. The intention is to focus efforts on those with severe disabilities who experience significant employment disadvantage. This is an administrative distinction unsanctioned by statute. (Disability Rights Mandate, supra, fn. 32, p. 30.)

50. Rothstein, supra, fn. 17, p. 116, criticizes slow implementation and lack of action or progress up to 1984.

51. 29 C.F.R. §§1613.701 et seq.


an individual must file a complaint with the appropriate state agency, if there is one, and the EEOC. (In practice the EEOC and state agencies handle the paperwork of dual filing so the individual only has to visit one office.) If there is no state equal employment law the complaint must be filed within 180 days of the last act of discrimination. Where there is a recognized state agency, the state must be given 60 days of exclusive jurisdiction to attempt resolution. A state agency may terminate its jurisdiction before the 60 days is up even if that is only done to allow the complainant to pursue the matter with the EEOC. When a state terminates its jurisdiction, either before or after the 60 day period, the complaint must be filed with the EEOC within 30 days of the state agency's termination of jurisdiction. In either event the charge must be filed with the EEOC within 300 days of the last act of discrimination.

Once the charge has been filed with the EEOC the Commission has exclusive jurisdiction for 180 days. The EEOC must determine if there is "reasonable cause" to believe a violation of the statute has happened and then must attempt to resolve the matter by "conference, conciliation and persuasion". If there is no resolution after 30 days the EEOC may file an action in court unless it is against a state or local government in which case the matter is referred to the Department of Justice which may file an action in court. If the EEOC, or the Attorney General, elects not to file suit, a notice-of-right-to-sue must be given to the charging party (the complainant).

There is no statutory limit on the time taken to investigate and conciliate. (This is where the excessive delay is experienced). 54 A charging party, subject to the doctrine of laches (delay which is inordinate, unexcused, and results in prejudice to the defendant), can wait for the EEOC to finish its proceedings. On the other hand, after 180 days the charging party can insist on issuance of the right to sue notice which ends the involvement of the EEOC. A charging party has the right to this notice even if the EEOC has found

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no reasonable cause to believe the statute has been violated.

During the first 180 days of exclusive jurisdiction the EEOC or Attorney General has the first option to file suit, subject to the requirement that the EEOC must actually attempt conciliation first. After that, the charging party may insist on a right to sue notice and the EEOC is limited to intervenor status. The litigation proceeds \textit{de novo}, not as judicial review.

A markedly different approach is used when the complaint is against the federal government as employer. Each federal government employer must appoint an "Equal Employment Opportunity Counselor". A federal employee must file the claim with one of these officers within 30 days of the alleged discriminatory act. The counsellor has 21 days to attempt to resolve the matter. A complainant who is not satisfied with a proposed resolution must file a formal "charge" with "appropriate agency officials", usually a designated Equal Employment Director, within 15 days of the "final interview" with the counselor. The agency must undertake an investigation and make recommendations for resolution.

A dissatisfied complainant may ask for a determination by the agency head or a formal hearing. A hearing will be conducted in an adversarial manner before a neutral administrative hearing officer. The agency head will review the hearing officer's findings and inform the complainant of the agency's final determination.

A complainant who is still dissatisfied may file suit in federal court within 90 days of the final determination or appeal the decision to the EEOC within 20 days. In the latter case the EEOC exercises appellate review of the record and may reverse or modify the agency's determination. A complainant may file suit challenging the EEOC determination within 90 days. The complainant must give the agency and the EEOC 180 days of exclusive jurisdiction. Either any time after 180 days without a final determination, or within 90 days of a final determination, the complainant may file suit in a federal district court for a trial \textit{de novo}. 
b. Section 502:

Section 502 of the *Rehabilitation Act*\(^\text{55}\) created the Architectural and Transportation Barriers Compliance Board. This Board is the implementing agency for the *Architectural Barriers Act*,\(^\text{56}\) first enacted in 1968 with no enforcement mechanism. The *Architectural Barriers Act* requires the Department of Housing and Urban Development (for residential structures), the Department of Defense (for military structures and defense facilities not intended for able-bodied personnel), the General Services Administration (for buildings whose intended use requires access by the public or may result in the residence or employment of disabled people), and the Post Office (for post offices) to issue standards regarding the design, construction, and alteration of certain buildings. These include buildings which are constructed, owned, or leased by the federal government and whose use requires access by the public or which may result in the residence or employment of disabled people. The *Act* also applies to buildings financed by the federal government. Although this statute illustrates each of the three implementation methods, it is discussed under prescriptive statutes because most of the buildings covered are owned by the federal government. The statute is prescriptive in relation to the government.

The Architectural and Transportation Barriers Compliance Board is composed of the standard setting agencies under the *Architectural Barriers Act*, other federal departments, and individual members representing the public who form a majority of the Board. The Board's primary functions are to ensure compliance with its accessibility standards, investigate alternative ways to eliminate architectural, transportation, and attitudinal barriers, to prepare plans and proposals to implement the objective of providing adequate transportation and housing for disabled people, and to issue minimum

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55. 29 U.S.C. §792.

56. 42 U.S.C. §§4151-4157; regulations found at 36 C.F.R. §§1150 et seq.
guidelines for the standard setting agencies to follow when setting their access standards as required by the *Architectural Barriers Act*.57

When the Board issued its first minimum guidelines the Department of Housing and Urban Development, the General Services Administration, and the Post Office voted against them. The Post Office announced it would not abide by the guidelines and would instead use its own lesser standards! The following year the Board issued revised minimum guidelines, removing a number of the more contentious requirements and removing all reference to leased premises. Based on these guidelines, the four standard setting agencies issued the Uniform Federal Accessibility Standards which remain as the technical guidelines federal agencies must follow.58

The Board may conduct investigations, hold public hearings, issue orders deemed necessary to enforce the ABA, and initiate or intervene in federal district court actions to enforce its orders or in relation to any civil action related the ABA.

The Board works primarily through voluntary compliance. Where the Board becomes aware of a possible violation, either through an individual complaint or otherwise, it must attempt to resolve the matter informally within 180 days. If the matter is not resolved the Board must issue a "citation", which is the first stage of a formal process leading to a hearing before an Administrative Law Judge, or issue a written statement explaining why a citation is not required. Complainants are not automatically parties in the administrative process but may petition a court to be added as a party to a formal hearing. A complainant and the participants at the formal hearing may apply for

57. Each of the four specified agencies must issue accessibility standards, which may require more than the ATBCB guidelines. In 1984 the four issued joint Uniform Federal Accessibility Standards (49 Fed. Reg. 31528 (1984)), but each agency codified the standards at different places in the C.F.R. It was not until 1988 that minimum standards were issued related to leased premises.

58. *Disability Rights Mandates*, supra, fn. 32, p. 26. The dispute about leased premises was about whether such premises had to be made accessible when the lease was signed or renewed or only when major alterations were otherwise being made. It was only when the circuit court in *Rose v. United States Postal Services*, 774 F.2d 1355 (9th cir., 1984), ruled that leased premises had to be made immediately accessible that the Postal Services issued its own standards and joined the Board in issuing standards for leased premises in 1988.
judicial review of the Board’s order. 59

Between 1977 and 1987 the Board received 1,735 complaints. Of the 1,323 complaints closed by 1989, 804 (61%) were beyond its jurisdiction, 456 (34%) resulted in some corrective action, and 63 (5%) were dismissed as unfounded. 60 These complaints included things such as inaccessible entrances, lack of ramps or curb cuts, and lack of signage and parking for disabled people.

The Rehabilitation Act illustrates two approaches to implementing a prescriptive statute. Section 501 requirements were set by a single agency. The EEOC issued regulations directed at the agencies it regulated setting forth details of what was required by the EEOC. Although there was a different enforcement system from that applicable to non-government regulated agencies, within the government it was a single system. Disability employment discrimination was regulated in the same way as race and sex employment discrimination.

In contrast the Architectural Barriers Act was implemented by one agency trying to coordinate four other agencies. In addition, the Board was required to establish a set of minimum accessibility standards upon which the other four agencies were required to establish their accessibility standards. It took from 1973 to 1988 before the regulations were finally issued. This multiple regulation setting system is continued in the Americans with Disabilities Act of 1990.

ii. The Americans with Disabilities Act, 1990:

The Americans With Disabilities Act of 1990 61 extends the scope of federal anti-discrimination law to many more public and private agencies than were covered under the

59. See generally Tucker and Goldstein, supra, fn. 7, pp. 11:4 et seq.
60. Disability Rights Mandates, supra, fn 32, p. 83.
61. 42 U.S.C. §§12101 et seq.
Rehabilitation Act. The Rehabilitation Act remains in full force alongside the Americans With Disabilities Act. This is important because, unlike the ADA, the Rehabilitation Act provides for some affirmative action requirements and, in some cases, provides for greater, or more effective, remedies than does the ADA.

The ADA is a federal statute which applies to state and local government and private enterprises. The constitutional authority for this exercise of federal authority is found in the commerce clause and the fourteenth amendment to the Constitution. The commerce clause ("industry affecting commerce") is so broad that Congress "sought to cover virtually all commerce" with the statute. The state immunity provision of the eleventh amendment is abrogated by s. 502 of the Act.

The ADA also adopts many of the policy decisions expressed in the Rehabilitation Act regulations, giving them the added legitimacy of Congressional approval. There are a few amendments and modifications to the previous regulations but they essentially remain unchanged. Section 501 of the ADA provides that nothing in that Act shall be construed so as to apply a lesser standard than required under title V of the Rehabilitation Act and regulations thereunder (or any other federal or state law which provides greater protection or benefit) unless it is specifically provided for in the ADA. Congress opted for the more liberal approach of the regulations issued for s. 504 of the Rehabilitation Act when drafting the ADA. Therefore, the cases interpreting the Rehabilitation Act, especially s. 504, can be fairly certain guides to how Congress intended the courts to interpret the ADA. The ADA adopts the same definition for the term "individual with a disability" as the Rehabilitation Act, but amends the latter Act to remove illegal drug

62. The phrase "covered entity" is the generic term used to describe the variety of legal personae subject to the legislation. Each Title provides a different definition of "covered entity" suited to the subject matter of the Title.

63. Shulman and Abernathy, supra, fn. 18, p. 6-11. An example of this breadth is EEOC v. Rinella and Rinella, 401 F. Supp. 175 (D. Ill., 1975). In that case a law firm specializing in local divorce cases was held to affect interstate commerce because it used interstate long distance telephone lines and ordered office supplies manufactured out of state.

64. Marx and Goldberger, supra, fn. 8, pp. 1-6 and 1-7.
use from the definition. The same enforcement mechanisms applicable to the Rehabilitation Act are essentially retained.

a. Title I: Employment:

Title I of the ADA prohibits employers, employment agencies, and labour organizations from discriminating in hiring, promotion, and the terms and conditions of work because of disability. The types of entities governed by the Act follow the scope of Title VII of the Civil Rights Act, 1964, and in general include entities "engaged in an industry affecting commerce". The Act covers all employers with more than 25 employees effective July 1992 and all with more than 15 employees effective July 1994, but not the United States, corporations owned by the U.S. government, Indian tribes, or private clubs exempt from taxation. Special provisions are made for coverage of Congress.65

The Act specifies that the disparate treatment (intentional) and disparate impact (adverse affect) concepts of discrimination apply but the regulations specify that there is no need to show statistically that a workforce fails to properly reflect the number of disabled people in the labour market (as is required with race and sex cases) to make out a prima facie complaint of disparate impact discrimination. It is sufficient if the impugned policy or practice does adversely affect disabled applicants or employees.

As with s. 504, reasonable accommodation of applicants and employees is required. The Act specifically mentions two aspects of accommodation. First, physical alterations to make existing facilities "readily accessible to and usable by"67 disabled individuals may have to be made. Second, accommodations such as job restructuring, development of part time or modified work schedules, reassignment of an employee to a vacant position,

65. 42 U.S.C. §12111(5).
67. This concept is not defined in the ADA.
acquisition or modification of equipment, and provision of readers or interpreters may be required.68

The duty to accommodate is limited by the proviso that the accommodation need not impose an "undue hardship on the operation of the business".69 "Undue hardship" is defined as an action "requiring significant difficulty or expense", the burden of proof of which is on the employer, considering the nature of the accommodation, the overall financial resources of the covered entity, the size of the business including number of employees and facilities, and the type of operation.70

The enforcement procedures and remedies provided for under title VII of the Civil Rights Act, 1964, and subsequent amendments to that Act, are applicable to this part of the ADA.71 The Equal Employment Opportunities Commission and other agencies having enforcement duties under the Rehabilitation Act must, within 18 months of the coming into force of the ADA, develop procedures with the Offices for Civil Rights of all agencies to ensure complaints are dealt with in a way which avoids duplication of effort or imposition of differing standards for the same requirements under the two Acts.72

b. Title II: Public Accommodation and Services Operated by Public Entities

Title II deals with the provision of services and programs and employment by public entities and requires reasonable accommodation or the provision of aids which are

68. 42 U.S.C. §12111(9).
69. 42 U.S.C. §12112(b)(5)(A). The original version required that an undue hardship "threaten the existence of the [employer's] business". According to Tucker and Goldstein, supra, fn. 7, p. 12:7, this was referred to as the "bankruptcy provision".
70. 42 U.S.C. §12111(10).
72. Ibid.
necessary to afford access to, and usability of, the services.

Title II is divided into two parts. Subtitle A sets out the general prohibition against discrimination because of disability by public agencies. Subtitle B is further divided into two parts. Part 1 sets out specific requirements for certain bus and rail public transportation services provided by public entities while part 2 deals with certain commuter rail systems. This structure was designed to correct what Congress considered to be misinterpretations of the s. 504 regulations.

Title II adds to the protection provided by s. 504 of the Rehabilitation Act, by extending federal non-discrimination norms to state and local governments, the National Railroad Passenger Corporation, and certain rail commuter authorities even if they do not receive federal funding. No "qualified individual" may be discriminated against in the provisions of benefits or services provided by, or employment by, covered entities because of disability. A "qualified individual" is one who, after reasonable accommodation has been made, "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Subtitle A contains only a bare statement of principle and all its substantive meaning is to be found in regulations promulgated by the Departments of Justice and

73. Marx and Goldberger, supra, fn. 8, p. 4-18.
75. 42 U.S.C. §12132:
... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
It is Title II which deals with employment by state and local governments. The removal of the word "solely", which appears in s. 504, was deliberate in order to avoid confusion about multiple causes of discrimination and to confirm the interpretation of the various regulations which provide that the word "solely" does not mean that if the discrimination is multifaceted then there is no liability. (Marx and Goldberger, supra, fn. 8, pp. 4-4 & 4-7.)
76. 42 U.S.C. §12131(2):
The term "qualified individual with a disability " means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.
Transportation. Reduced to their essence, the regulations adopt title I requirements for employment and title III requirements for services. These requirements are, in turn, based on the s. 504 regulations,\textsuperscript{77} except where the ADA specifically provides other standards. Congress has instructed the primary regulation issuing agencies to bring order to potential chaos by directing them to ensure the various regulations require the same standards.

Subtitle B provides specific rules for public entities providing public transportation. Congress made specific provisions regarding transportation to clarify and correct misunderstandings which arose under s. 504 implementation, particularly to ensure that s. 504 regulations applied to all commuter railways, not just Amtrak, and to provide for regulations which would recognize the difference between Amtrak and commuter railways to take into account the different requirements of different types of rail car. Also, Congress had to modify Amtrak’s accessibility requirements since it had failed to provide sufficient funds for Amtrak to meet its obligations under s. 504.\textsuperscript{78}

Part 1 of subtitle B covers public transportation provided by fixed-route and demand responsive systems of certain bus, rail, and other conveyances.

All purchased or leased new buses and rail vehicles must be "readily accessible to and usable by" disabled people, including wheelchair users. If a used vehicle is bought or leased the entity must make "demonstrated good faith efforts" to obtain one which is readily accessible and usable. A vehicle which is remanufactured to extend its life by five or more years must be made readily accessible to and usable by disabled people "to the maximum extent feasible".\textsuperscript{79} The readily accessible standard requires that disabled people, regardless of their disability, must be able to embark, ride, and disembark safely and effectively. Accessible conveyances require lifting and other devices to effect entry

\textsuperscript{77} Marx and Goldberger, supra, fn. 8, p. 4-12.
\textsuperscript{78} Ibid, p. 4-18.
\textsuperscript{79} 42 U.S.C. §12142(c)(2)(A) provides an exception for historic vehicles designed for use in designated historic places.
and exit for wheelchair users and others who are mobility impaired, places for wheelchairs, suitable restraining straps, and other modifications to allow effective use.

Operators of a demand responsive system must ensure that the overall level of service, "when viewed in its entirety, provides a level of service to [disabled] individuals equivalent to the level of service" provided to non-disabled users. When a system ensures an equivalent level and quality of service to disabled customers not all of its buses need be accessible. The entity must have on hand enough accessible vehicles to ensure equally efficient services.

Some people, because of the nature or extent of their disability, will be unable to use the regular public transportation system even when made as accessible as possible. The ADA requires public entities which operate fixed route systems to provide paratransit or other special transportation services to those who cannot use the regular service even when that service is usable by most disabled people including wheelchair users. Such a service must provide a "comparable" level of service to disabled people and at least one of their companions (more if room is available) and have response times which are "to the extent practicable" the same as the regular system. An entity may be exempted if it can show that such a service would impose an undue financial burden, but in that case it must provide paratransit services to the extent that it would not be an undue burden. Factors which may be considered to determine if there would be an undue financial burden include general financial constraints within the service area, population and population density, the level of paratransit service already provided, the interim level of accessibility of the fixed route system, what fare increases would be necessary, and any


81. Transportation for public schools is covered under s. 504 regulations. There is no need to have all buses accessible, only enough for those children on particular routes who need them.

82. 42 U.S.C. §12143.
consequent reduction in the overall level of service.Operators of fixed route systems must, within 18 months of the coming into force of the ADA, and annually thereafter, submit a plan for providing paratransit services to the Secretary of Transportation.

Section 225 authorizes the Secretary of Transportation to exempt covered entities from the requirement that new buses be accessible if it is shown the entity was unable to obtain accessible buses after "good faith efforts" were made and that to delay purchase would significantly impair service to the community. The Secretary must place a time limit on these exemptions (how long is not specified) and advise Congress of the exemptions.

New facilities which support the transportation service and which are built 18 months after the coming into force of the Act must be made readily accessible to and usable by disabled people. When facilities are renovated they must, "to the extent feasible", be made readily accessible. Public entities must develop plans to ensure all key stations of rapid-rail and light-rail systems are made readily accessible within three years, but the Secretary of Transportation may extend that time up to thirty years. A public entity operating a light- or rapid-rail system must ensure at least one vehicle per train is readily accessible within five years of the coming into force of the Act.

Part II of subtitle B covers publicly owned intercity and commuter rail services and stations owned by public or private entities. These entities must ensure at least one passenger car per train is readily accessible and usable within five years. Although purchased or leased new cars must be accessible, an entity which purchases or leases used cars need only "demonstrate good faith" efforts to obtain readily accessible cars. Remanufacturers of cars must ensure, to the extent feasible, that such cars meet the readily accessible standard. New stations must be constructed so as to be readily accessible; renovations must meet this standard "to the extent feasible". Existing stations must meet

83. Marx and Goldberger, supra, fn. 8, p. 4-41.
the readily accessible standard as soon as practicable but in any event within 20 years. Existing key stations must be made readily accessible within three years but the Secretary of Transportation may extend this time up to 20 years.

Section 203 provides that the enforcement mechanism is to be the same as that for s. 504 of the Rehabilitation Act. The regulations also require every public entity of fifty or more employees to designate at least one employee to coordinate efforts to comply with title II, to adopt a grievance procedure, and to designate an employee to investigate complaints under the Title.85

c. Title III: Public Accommodation and Services Operated by Private Entities:

Title III prohibits discrimination in all privately operated places of public accommodation and public transportation companies. Places of public accommodation include hotels and motels, restaurants and bars, theatres, stadiums, other places of public recreation, sales or rental stores, service outlets such as laundromats, gas stations, banks, stations used for public transportation, recreation sites such as parks and health spas, bowling alleys, and social service centres such as day cares, food banks, or seniors homes. For convenience, the ADA refers to these generically as "places of

84. The Senate Committee said its intent was to use the procedures and remedies applicable to s. 504 of the Rehabilitation Act. Since cutting off federal funds was inapplicable to state agencies not receiving federal funds, the major enforcement sanction will be the Department of Justice filing suit in federal district court for injunctive relief. There is also a right of private action. (Labour Law Reports #395, ¶803)

85. 28 C.F.R. §35.107. This is a continuation of a s. 504 regulatory requirement (45 C.F.R. §84.6).

86. 42 U.S.C. §12182 & §12184. §12182 lists 12 categories of activities each of which includes an open-ended list of specific activities. 42 U.S.C. §12183 imposes a duty to ensure that all newly constructed "commercial facilities" are readily accessible to and usable by disabled people. Alterations must, to "the maximum extent feasible", meet this same standard.

87. Residential accommodation is covered by the Fair Housing Act, 42 U.S.C. §§3601-19. Private clubs and religious organizations are exempted from coverage, although not-for-profit agencies will be covered if they hold themselves open to use by the general public.
public accommodation."

The general rule that covered entities are prohibited from discriminating against disabled people is set out in s. 302(a). The section specifies that it is a discriminatory practice to prevent a disabled person from participating in or benefiting from the services provided by a public accommodation, to allow an individual with disabilities to participate or benefit but in a way that is not equal to that afforded to others, or to provide the services in a different way or in a segregated setting from others. The services must be provided in the most integrated setting appropriate to the individual.

Title III contains a number of provisions which limit or modify these general propositions.

It is discrimination to fail to make reasonable modifications in policies or practices, or to provide auxiliary aids and services, in order to afford disabled people the opportunity to access the goods or services "unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such" goods or services or, in the case of the provision of auxiliary aids, if provision of such aids would "result in an undue burden." The obligation to provide auxiliary aids or services is limited by the concept of "undue burden" which is the title III equivalent of "undue hardship" in title I. Determining whether an accommodation is an undue burden requires consideration of the nature and cost of the aid or service, the overall financial resources of the facility and the covered entity, and its effect on the overall operations of the covered entity. However, even if one type of accommodation is an undue burden, other accommodations short of undue burden must be made.

Title III introduces the new concept of "readily achievable". This is defined as an

88. 42 U.S.C. §12182(a): "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

89. 42 U.S.C. §12182(b)(2)(ii) & (iii).
action which is "easily accomplishable and able to be carried out without much difficulty or expense." A separate subsection deals with discrimination caused by physical barriers in existing facilities. It is discrimination to fail to remove architectural, communication, or other physical barriers in existing facilities and vehicles where such removal is readily achievable. Where the entity can demonstrate that removal is not readily achievable it must still provide the goods and services by alternate means if such means are readily achievable.\(^90\) The factors to be considered in assessing whether an action is readily achievable include the nature and cost of the action, the financial resources, size, number of employees, and number of facilities of the entity, and the type of operation.\(^91\)

"The concept of what is readily achievable is vital to the ADA's aim of promoting access for the disabled without unduly and unfairly burdening owners of existing places of public accommodations."\(^92\) This standard is much lower than the "undue burden" and "undue hardship" standards.

Different standards apply to newly constructed or renovated public accommodations or commercial facilities. All newly constructed facilities intended for occupancy more than 30 months after the date of the Act came into force must be designed and constructed to be "readily accessible to and usable by" disabled people unless to do so would be structurally impracticable. If significant renovations are made they must, "to the extent feasible", allow the altered portions of the facility to be "readily accessible to and usable by" disabled people. Accessibility refers not just to wheelchair access but includes braille markings, flashing alarms, telecommunication devices, and similar accommodations for various disabilities.\(^93\)

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91. 42 U.S.C. §12181(9).
93. An exception to the rule on accessibility for new and altered premises is that for buildings less than three stories and less than 3000 square feet an elevator does not have to be installed (although each floor must be fully accessible!), unless the building is a shopping centre or the office of a professional health provider.
The "readily achievable standard" focuses on the ease with which the covered entity could undertake the action. The "readily accessible" standard, on the other hand, focuses on the needs of disabled people.

The provisions of title III dealing with transportation apply to companies whose primary line of business is transportation and those who provide transportation incidentally to their main line of business.

Starting with the latter first, these entities are subject to the provisions respecting goods and services found in s. 302 but some special provisions are made to deal with transportation issues. It is discrimination for a company operating a fixed route system to purchase or lease a vehicle which seats more than 16 people that is not readily accessible to and usable by disabled people, including those who use wheelchairs. However, it is not discrimination if such a company purchases or leases a vehicle which seats less than 16 people that is not readily accessible if its system, "when viewed in its entirety", "ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service" provided to others.

It is discrimination for a company operating a demand responsive system to fail to operate its system so that, "when viewed in its entirety", it "ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service" provided to others. In addition, it is discrimination for such a company to purchase or lease a vehicle which seats more than 16 people that is not readily accessible to and usable by disabled people, including individuals who use wheelchairs, "unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of

94. 42 U.S.C. §12184. This does not include airlines, which are covered by the Air Carrier Access Act, 49 U.S.C. §1374(c), or school buses.

95. 42 U.S.C. §12182(b)(2)(B), (C), & (D). Again, school buses are not covered.

96. 42 U.S.C. §12182(b)(2)(B). Implementation of the section was delayed for 18 months after the Act came into force.
service to individuals with disabilities equivalent to that provided to others.\(^7\)

Private entities whose primary business is transportation are dealt with in s. 304 which repeats the general non-discrimination principles of s. 302. New leased or purchased vehicles which seat more than eight people must be readily accessible and usable unless the vehicle is to be used on a demand response system. In that case, the entity need only demonstrate that its services, when viewed in their entirety, provide an equivalent level of service to disabled people. New rail cars must meet the readily accessible standard; rail cars remanufactured to extend their life by ten years must be made readily accessible "to the maximum extent feasible".

Over the road buses (a bus with an elevated passenger deck over a baggage compartment - the standard Greyhound bus) are dealt with by separate rules because Greyhound argued before the Senate hearings that the cost would be excessive if it had to implement the rules in relation to its business. Disability groups said it would cost one fifth what Greyhound said. Instead of deciding what standard to put in the legislation, Congress enacted a requirement that the Secretary of Transportation issue interim regulations for access "to the extent possible" without requiring the purchase of buses which are accessible by people reliant on wheelchairs, auxiliary lifting devices, or modifications to existing buses. The Office of Technological Assessment is required to undertake a study, to be completed within 3 years, to determine the access needs of disabled people to over the road buses and the most cost-effective method of providing access. Within one year of the completion of the study the Secretary of Transportation must issue new regulations dealing with over the road buses.

The remedies and procedures of title II of the *Civil Rights Act of 1964*\(^8\) are applicable to title III. Title III may be enforced by private action for preventive relief

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\(^7\) 42 U.S.C. §12182(b)(2)(C). Implementation of the section was delayed for 18 months after the Act came into force.

\(^8\) 42 U.S.C. §§2000a-3a.
(with their remedy restricted to equitable relief) or by the U. S. Attorney General. Where injunctive relief is granted it must be of such a nature as to accord access and may include requiring the provision of auxiliary aids, modification of policies, and renovation of premises. The Attorney General has a duty to investigate alleged violations of the Act and may bring suit in U.S. district courts if there is a pattern or practice of discrimination or in the case of an individual complaint. If the Attorney General has initiated the action the court may grant equitable relief, other appropriate remedies including monetary damages to an aggrieved person, and a civil penalty up to $50,000 to vindicate the public interest. Punitive damages are not available. 99

d. Title IV - Communications:

Title IV amends the Communications Act of 1934 100 to require telecommunications companies to provide nation wide services for hearing and speech impaired individuals within three years which are "functionally equivalent to voice telephone services provided to nonimpaired individuals". This is to be accomplished by use of telephone relay services. The Federal Communications Commission has issued regulations 101 which require 24 hour service, at the same cost as regular service, allow any type or length of call, ensure confidentiality, and prevent operators from altering the content of the messages.

This title also contains provisions to require closed captioning of federally funded public service announcements. It is the responsibility of the producer to ensure the announcement is closed captioned and of the broadcaster to include the closed captioning.

99. Enforcement of the Act against entities with fewer than 25 employees or gross receipts less than $1,000,000 cannot occur until 24 months after the Act came into force and against entities with less than 10 employees and less than $500,000 in gross receipts for 30 months.

100. 47 U.S.C. §§225 & 611.

101. 47 C.F.R. §64.604.
No provisions have been made requiring captioning of television programs.

Title IV is enforced by the FCC or delegated state authorities. The *Communications Act* allows a right of private action in federal district courts, the right to file a complaint with the FCC, and the power of the FCC to investigate and order appropriate redress.\(^{102}\)

D. Comments on the Effectiveness of Federal Law:

The Advisory Commission on Intergovernmental Relations commissioned a study to compare how the federal and state governments were implementing various disability rights laws (before the *Americans with Disability Act of 1990*).\(^{103}\)

With regard to legislation respecting architectural barriers the Commission found that neither the federal nor state governments have a central data base to inventory the barriers that exist in buildings they are responsible for. Despite some statistical and anecdotal evidence, it was impossible to measure the types of access renovations actually being made or their rate of implementation.\(^{104}\)

The Commission identified as barriers to compliance negative attitudes, fear about costs, lack of information, unawareness of cost-effective methods of meeting mandates,

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102. Title V of the *ADA* contains an assortment of miscellaneous provisions:
   - Section 501(c) provides that the *ADA* does not affect the operation of insurance, health, and *bona fide* benefit plans which are based on underwriting, classifying, or administering risks.
   - Section 501(d) specifies that nothing in the *ADA* requires an individual to accept an accommodation or aid which the individual does not wish to accept.
   - Section 504 requires that the ATBCB issues minimum guidelines for the purposes of titles II and III. The guidelines must include procedures and requirements for alterations which would threaten or destroy the historic significance of qualified historic buildings.
   - Section 506 requires the Attorney General, in consultation with the EEOC, the Secretary of Transportation, the ATBCB, and the FCC to develop a plan to assist covered entities in understanding the requirements of the *Act*. The responsible agencies must prepare technical manuals for use by covered entities so they will know how to be in compliance with the law.
   - Section 513 encourages the use of alternative means of dispute resolution including settlement negotiations, conciliation, mediation, and arbitration to resolve disputes arising under the *Act*.

103. *Disability Rights Mandates*, *supra*, fn. 32.

104. *Ibid*, pp. 80-1 and p. 84.
lack of funds, lack of information systems and regular communications, competing pressures, little involvement of disabled people in the administration of compliance process, and lack of leadership. The Commission ranked the top seven "serious impediments" to implementing the disability rights mandates identified by state officials and advocacy group representatives which are summarized in Table 11.105

Table 11: Summary of "Serious Impediments" to Implementing Disability Rights Mandates Ranked by State and Advocacy Group Officials:

<table>
<thead>
<tr>
<th>Issue</th>
<th>State</th>
<th>Advocacy</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Concerns about Accommodation Costs</td>
<td>49%</td>
<td>51%</td>
</tr>
<tr>
<td>2. Insufficient Funds for Accommodations</td>
<td>45%</td>
<td>42%</td>
</tr>
<tr>
<td>3. Other Policy Issues More Important in State</td>
<td>37%</td>
<td>55%</td>
</tr>
<tr>
<td>4. Lack of Leadership Support/Commitment</td>
<td>35%</td>
<td>45%</td>
</tr>
<tr>
<td>5. Low Recognition of the Impact of Barriers</td>
<td>28%</td>
<td>35%</td>
</tr>
<tr>
<td>6. Responsibility for Enforcement Divided Among Agencies</td>
<td>27%</td>
<td>37%</td>
</tr>
<tr>
<td>7. Confusion about Accessibility Standards</td>
<td>27%</td>
<td>41%</td>
</tr>
</tbody>
</table>

Among the factors which were identified as expediting compliance by governments with the mandates were: single agency lead (compare EEOC with the ABA), identifying low cost methods of compliance, education and training of implementing personnel, establishing resource pools of knowledge, and the sharing of information among the various levels of government.

The National Council on Disability conducted a study of the implementation of ADA one year after its introduction.106 Its major finding was that implementation of

105. Ibid, p. 86.
106. ADA Watch - Year One, 1993, Washington, D.C.
the ADA is proceeding quite well with some covered entities providing "exemplary" voluntary compliance, many others doing the minimum required, and some others ignoring the law. The federal government was to said have performed well in its ADA implementation responsibilities. ADA implementation to date was said to not be unduly burdensome to businesses with costs being less than 1% of gross revenues.

The disabled community was found to have adopted an implementation strategy of education and negotiation with litigation reserved as a last resort. People with some disabilities, such as vision and hearing impairments, expressed frustration with the strong emphasis on mobility disabilities. The report noted that lack of data hampered efforts to determine the precise progress and impact of the ADA. The report called for more funding for advice and assistance, technical guidance, cooperative projects, and research.

The study reported that city governments complained of lack of funds. However, it was also noted that much of what the ADA requires cities to do was also required by the Rehabilitation Act and that the same cities that are making the same complaints are the ones which failed to meet their obligations under the Rehabilitation Act.

All the public transport providers submitted the required plans on schedule but nearly half requested time extensions for complying with the key stations requirements.

The study noted that although many private agencies were producing ADA related products for sale a notable number were selling misleading, scare mongering, and sometimes even fraudulent material. Companies are spending money on things the government provides for free, information seminars are being conducted by "consultants" who are misinformed and even some who are outright charlatans, and on accommodations which are expensive and unnecessary.

Despite these problems with the private sector, the report recommends that the government emphasize its leadership role as a catalyst for change and reduce its involvement in direct provision of technical assistance. Education seminars, technical assistance and advice can be better provided though the private sector. This approach of
using the private sector (defined as disabled community groups and businesses) is seen to be particularly appropriate for implementation in rural areas and minority communities.

The EEOC reports that in its first year of implementing the ADA 15,274 complaints have been filed representing 17.4% of the total complaints filed. There has been a 59.9% increase in its "pending inventory" over the last two years and there will be a projected 17 month inventory of complaints waiting to be investigated by the end of 1993.\textsuperscript{107}

E. Conclusions:

There is little information available by which one can determine the effectiveness of U.S. federal policy to eliminate discrimination against disabled people. The Rehabilitation Act attempted to implement a policy shift by a combination of prescription and contractual and funding controls. The only significant study on its effectiveness dealt with architectural barriers and concluded that no one knew to what extent the Act had prompted change. It is a reflection of the intuitive sense of how effective the Rehabilitation Act has been that Congress passed the Americans with Disabilities Act, 1990. This Act take a prescriptive approach to implementing the same policy shift. The early reviews of this legislation are substantially positive but not enough time has passed since the Act came into force to reach any definitive conclusions.

Unlike any Canadian legislation, the regulations under s. 504 of the Rehabilitation Act and the ADA itself define and limit the scope of the general prohibition against discrimination against disabled people. For example, the regulations under s. 504 of the Rehabilitation Act prohibit discrimination against disabled students caused by provision of the service in inaccessible locations by a university receiving federal financial support.

\textsuperscript{107} Labour Law Reports #487.
However, the regulations limit this right by adopting the accessibility standard of "program accessibility". This concept permits the university to offer services in inaccessible buildings as long as the program, when viewed as a whole, is accessible. It is sufficient if alternative arrangements are made for students who cannot join their colleagues in an inaccessible building. The concept of "program accessibility" was designed to limit the cost of renovating inaccessible universities.

The *Americans with Disabilities Act, 1990* similarly defines and limits the general policy decision to prohibit discrimination against disabled people. For example, title III prohibits discrimination by private entities which provide public accommodation and services. It requires that these entities reasonably accommodate people short of an undue burden. However, when dealing with architectural and other physical barriers in existing structures and facilities the title requires entities to take action only where such action is "readily achievable". There is no requirement for renovations as long as the structure remains standing. This was a deliberate policy choice designed to limit the cost of implementing the general prohibition against discrimination. Another example is that, although title III contains extensive rules related to access to transportation, long distance passenger buses are exempt from the Act. This decision was made because Greyhound argued that accessible passenger buses are not yet available on the market. How this problem is to be handled was delayed by instructing various government departments to study the issue and publish regulations within four years of the coming into force of the Act. No direction was given on the standards of accessibility the regulations would have to implement.

The American models provide useful concepts for consideration as Canada develops a clearer understanding of accessibility rights. However, it is important to note that the U.S. legislation is as concerned with controlling the costs of accessibility as it is with implementing accessibility rights. The *ADA* balances each general non-discrimination declaration with fairly detailed limitations which are designed to control
the costs of implementing the general principle. The American models should be studied carefully by Canadians but they are not necessarily suitable for wholesale adoption.
VIII. PROPOSALS FOR IMPROVED IMPLEMENTATION OF ACCESSIBILITY RIGHTS:

Historically disabled people have experienced social and economic marginalization. As a disadvantaged group subject to discrimination, disabled people are disproportionately represented among the poor and powerless. To improve their social position, public policy must be based on the equality theory of full integration. It is only when disabled people are fully integrated with the rest of society that they will be free to make the important life choices based on their individual needs and interests that others take for granted. This thesis examines one particular aspect of discrimination, viz. accessibility rights. Although there are laws which prohibit discrimination against disabled people, the implementation of accessibility rights is very ineffective. In this chapter I will be making a number of proposals to improve the implementation of accessibility rights.

The concept of disability as a social construct recognizes that the reason disabled people are disadvantaged is a combination of an individual's functional limitations caused by a medical condition and society's response to that individual. The idea that disabled people, as a group, have common characteristics creating common group interests was slow to develop. This was because of the very great diversity among disabled people. The types of disabling conditions and individual variation within each type, combined with a history of marginalization and segregation, made it difficult for disabled people to identify themselves as a coherent group with common group interests which could be advanced by political organization.

As discussed in chapter II, the life options of disabled people have been limited by social bias, discrimination, and barriers created by the disability itself. Social bias, which may take the form of stigmatisation or paternalism, has kept disabled people segregated and restricted their power of self-determination. Disabled people may experience direct
or indirect discrimination. A service provider may refuse to provide a service to a disabled person because of a personal animus or from a paternalistic fear for the person's safety and well-being. More insidiously, a disabled person may not be able to benefit from a service because of a policy or requirement that, even though neutral on its face, presents a barrier to that person. A service provider who will not remove that barrier or reasonably accommodate the individual has just as effectively discriminated against the disabled person as someone motivated by prejudice. There are, of course, situations in which the disability itself creates a serious limitation on the individual's options.

Since the concept of equality is elastic there are a variety of different forms that equality might take which would, in their own way, promote the interests of disabled people. The traditional common law theory of formal equality is a very limited concept which is incapable of correcting fundamental inequality in society, although it has legitimate application to situations of arbitrary or capricious conduct. To correct the historical disadvantage experienced by disabled people the concept of substantive equality should be adopted. This concept recognizes the power relationships between people and groups in society and seeks to achieve real equality in the substance of people's condition. The concept of substantive equality by itself does not determine the exact face of equality for disabled people. In chapter III, I argued that the equality concept of full integration should form the basis for public policy toward disabled people. This concept is based on the principles of demedicalization, deinstitutionalization, mainstreaming, and consumer control.

In chapter IV, I showed how the concept of full integration came to notionally inform Canadian public policy in relation to disabled people. Early examples of the adoption of this concept of equality are the movement to deinstitutionalize mentally ill patients and to mainstream children into the regular school system. In 1981 the House of Commons Special Committee on the Disabled and the Handicapped recommended that social policy in relation to disabled people should be based on the principle of full
integration. In 1991 the federal government announced its "National Strategy for the Integration of Persons with Disabilities." The objectives of the strategy are to promote equal access, economic integration, and effective participation to bring disabled people into the mainstream of Canadian society. The Special Committee was quite scathing in its criticism of the government's failure to promote and protect the interests of disabled people. Despite legal protection against discrimination and the government's commitment to take action to improve the social condition of disabled people changes have been very slow. I discussed in this chapter some of the difficulties in the implementation of any social policy. Despite the professed support of governments and legal prohibitions against discrimination, disabled people must continue intensive political advocacy to promote their interests.

I briefly reviewed the results of a number of surveys on accessibility conducted by the Canadian Human Rights Commission. These surveys showed that federal government departments and private entities under federal jurisdiction were delivering their services from buildings which, on average, met only about 50% of the requirements of the Canadian Standards Association Barrier-Free Design Standard.¹ A careful observer will note that barriers to access remain throughout the built-up environment in any town or city in Canada.

Accessibility rights are guaranteed by human rights legislation and the Charter and are primarily enforced by human rights commissions and the courts. Chapter V contains a descriptive review of human rights legislation as it relates to the prohibition of discrimination against disabled people in the provision of services. The legislation is remedial and thus interpreted broadly. The statutory and judicial definitions of discrimination include both direct and indirect, or adverse effect, discrimination. All the human rights statutes prohibit discrimination against disabled people in the provision of

¹ See text accompanying fn. 53 in chapter IV.
goods, services, and facilities customarily available to the public. Although the legislation distinguishes between public and private activities, and only attempts to regulate public activities, these provisions have been interpreted very broadly so that if an entity interacts with the public at large, or selected portions of the general public, it will be subject to the legislation.

The general prohibition against discrimination in the provision of services is limited by an implied or expressed *bona fide* justification defence, and its equivalent for adverse effect discrimination. The exact scope of accessibility rights is uncertain at this time because of the lack of jurisprudence interpreting this defence. Despite concerns about the potential for the *bfo* defence to seriously limit the effectiveness of the legislation, I think that the more pressing problem is the nature of the enforcement regime provided for in the legislation. In chapter V, I outlined some of the deficiencies of this model.

Chapter VI is primarily a descriptive review of the *Charter of Rights and Freedoms*, in particular s. 15, the equality rights section, and s. 1 which sets out the justificatory criteria for limiting the rights guaranteed. The most positive indication that the *Charter* may become an effective tool for the promotion of the interests of disabled people is that the Supreme Court of Canada seems to be adopting the concept of substantive equality as the theory of choice when interpreting s. 15 of the *Charter*. Despite this, there are also significant concerns about the potential of the *Charter*. The *Charter* applies only to the actions of legislatures and governments. The potential of the *Charter* to enforce accessibility rights is in some doubt because of the lack of specificity to give substance to the general equality guarantee in s. 15 and the increasing tendency of the courts to grant the legislatures a high level of deference when assessing social and economic legislation against the *Charter*. Using the *Charter* to challenge legislation or regulations implementing disability policy involves asking the courts to review the choice of policy options made by a government. The courts have had very little experience in dealing with the competing values and objectives which go into making policy decisions
affecting disabled people. It is not yet known how competent the courts are to assess these policy judgements nor if they are able to formulate remedies which advance the interests of disabled people. Furthermore, the cost of using the enforcement mechanism, the courts, is a significant barrier to resorting to the Charter.

The existence of the leading American disability statutes is well known to Canadians and they are frequently held up as examples which we should follow. In addition, unlike Canadian legislation, these statutes specifically adopt a number of policy options. In order to determine how applicable these models might be to Canada, in chapter VII, I described the contents of the Rehabilitation Act, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act, 1990. These statutes contain three implementation strategies: implementation by contract, financial control, and prescription. The Rehabilitation Act depends mostly on regulations to give it substance and the policy choices were imposed by these regulations. On the other hand, the IDEA and the ADA include the major policy options which then direct the formulation of regulations. Much of the ADA is taken up with limitations and restrictions on the general non-discrimination principles declared by the legislation. I conclude that, while some concepts in the American legislation should be adopted, the models are not appropriate for wholesale transfer to Canada.

The social and economic condition of disabled people in Canada is recognized to be unacceptable. The solution to the problem is the effective implementation of a policy of full integration. Despite government policy which appears to accept this policy approach implementation of the full integration principle, including accessibility rights, has been very slow. Human rights legislation and the Charter have not been particularly effective tools to enforce accessibility rights.

The denial, or insufficient implementation, of accessibility rights is a systemic problem. By this I mean that services are provided in the context of the established policies and practices in the various institutions which have a role in the complicated
system which leads to the final delivery of a service. For example, to provide the service of a restaurant one has to consider, among the multitude of factors, the initial construction of the building and transportation to get to the restaurant as well as the actual service to the customer. At every decision level, policies and practices impact on accessibility rights. The complaint model for enforcement of these rights is inefficient and substantially ineffective. If, for example, a complaint was filed against the restaurant because it was not physically accessible, the investigation would be based on the existing state of the structure subject to the *bif* defence. After a restaurant is built, the *bif* defence would often be successful because requiring renovations to allow access would be found to be an undue burden because of the expense.

Three things are required to improve the implementation of the public policy which prohibits discrimination against disabled people caused by accessibility barriers.

First, there must be a clear statement of the standards against which claims for accessibility rights are to be measured. The existence of a *bif* defence, or some equivalent concept for adverse effect discrimination, in human rights legislation is a clear indication that the legislatures did not mean the non-discrimination provisions to be absolute. But the legislatures have not tried to answer the difficult questions of how much access, for whom, over what time period. Second, there must be a recognition that the implementation of accessibility rights requires a multi-pronged, coordinated approach so that the systemic cause of the problem can be dealt with. Third, there must be additional implementation strategies. Different approaches are required to deal with remedying denials of accessibility rights caused by existing physical structures and equipment and preventing violations in structures and equipment not yet built or developed. These strategies are the imposition of responsibilities on self-governing professions, imposing a duty to implement accessibility rights on existing regulatory agencies, and amendments to human rights legislation to add a regulatory implementation strategy to complement the existing complaint based strategy. The regulatory strategy should be to impose a
requirement for adaptation planning on service providers. I note in passing that, although each of the three strategies could stand alone and would make a significant contribution to improving the implementation of accessibility rights, for the greatest effect all three should be pursued simultaneously.

A. The Need for Clear Policy Direction:

Stephen Percy described what happened in the United States when it tried to implement the disability policy of the Rehabilitation Act without clarifying which of the policy options logically available under the general policy were to be applied in practice. In summary, what happened was that years were spent arguing, in the many judicial and political arenas available, which policy option was to be adopted. As I have previously indicated, the legislatures and the bureaucrats in Canada have provided even less direction than Congress.

In his book Percy described a model to analyze the implementation of public policy change and applied it to the policy adopted by the Rehabilitation Act. Implementation of a public policy begins with the legislature adopting broadly based organizing principles which describe the general nature of the public policy choice. These principles are then augmented by a number of operating principles which serve to further clarify and refine the policy choices to apply from the range of options which the broad principles would allow. Operating principles may be set by the legislature, the government, the courts, or administrative agencies charged with implementing the policy. He argued that, whoever established these principles, they had to be clearly stated before

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2. 29 U.S.C. §§790 et seq.
3. Disability, Civil Rights, and Public Policy: The Politics of Implementation. See text accompanying fn. 32 in chapter III.
4. Ibid.
effective implementation could occur.

To illustrate the difference between these two types of principles Percy gives the example of school desegregation. One of the organizing principles of public policy in relation to public schools is desegregation. Busing children between schools is one of the operating principles. This is an example where the change in public policy was imposed by the courts not the legislatures.\(^5\)

After the broadly based principles have been developed, Percy's analytical model has three more stages in the process of policy implementation. First, there is a process of *policy refinement*. This is the process of converting the still general operating principles into procedures, processes, and guidelines relevant to the administration of a particular program. The next stage in policy implementation is *policy diffusion*. This is the process of communicating the policy refinements to the relevant actors in a system. Percy's final stage is *policy execution*. This is the actual application of the policy to concrete situations.

Currently in Canada both the specification of operating principles and policy refinement in the area of accessibility rights are occurring in two fora. First, they are being developed through the human rights enforcement system. The requirements of the law are being defined by cases which reach a board of inquiry or a court. The development of this body of law is not consolidated so as to be easily accessible to those outside the legal system. Policy refinements which result from decisions of human rights commissions are even less available to others who need to know. This is because, as I have discussed, the commissions do not have any mechanism to organize and publish their decisions so that people can have access to their jurisprudence.

Second, the specification of operating principles and policy refinement are being developed by many other regulatory entities. For example, the authorities responsible for issuing building codes are including accessibility requirements in revisions to the codes.

\(^5\) I do not think there is any inherent way to differentiate between these two types of principle; it depends on the level of detail you wish to divide things into.
Another example is found in the *National Transportation Act* which gives the National Transportation Agency a specific mandate to issue regulations related to access to transportation under its jurisdiction.

Since the legislatures have not established operating principles to guide the implementation of their public policy choice, the administrators must first establish them before going on to actual implementation. Delays are caused because the regulated community takes every opportunity to continue the argument about how the basic organizing principles should be implemented in every available political arena. And, of course, their interest is to minimize the impact on their operations.

The operating principles, which instruct the policy implementers which policy among a variety of choices is to be adopted in the implementation of the broader organizing principles, should be set by the legislatures. These are questions of major social impact and should not be left to subordinate regulatory bodies. On the other hand, as Professor Ratushny has argued, policy refinement is more effective if done by regulation because the process of amending legislation is too slow to effectively react to rapidly changing technology and economic feasibility.

i. Operating Principles:

The *Americans with Disabilities Act, 1990* provides many examples of organizing and operating principles which define the scope of the broad statement of public policy contained in the *Act*. The legislation reflects Congress' concern to balance the elimination of discrimination against disabled people with the, primarily, economic interests of others.


7. Edward Ratushny, *Implementing Equality Rights: Standards of Reasonable Accommodation with Legislative Force*, in Lynn Smith et al. (eds.), *Righting the Balance: Canada's New Equality Rights*, p. 255. Although he was writing about regulations to refine the policy of reasonable accommodation his arguments apply equally to any other policy.
One example of this is how the Act sets out operating principles for the implementation of the organizing principle of non-discrimination in the provision of services by private entities. The first operating principle is that it is discrimination to fail to make reasonable modifications in policies or practices to accommodate the needs of disabled people unless the entity can demonstrate that making these modifications would fundamentally alter the nature of such goods or impose an undue burden. However, where the discrimination is due to physical barriers in existing facilities a different operating principle applies. In these situations the entity is required to take actions which are "readily achievable", that is, actions which are "easily accomplishable and able to be carried out without much difficulty or expense." This operating principle, which in effect is a lower standard for accessibility, was a deliberate mechanism to limit the costs of serving disabled people but also limits accessibility rights. A third operating principle applies to newly constructed buildings. These must be "readily accessible to and usable by" disabled people unless to make them so would be structurally impractical. Where significant renovations are made there is another operating principle. The renovated part of the building must be readily accessible to and usable by disabled people "to the extent possible". The detailed meaning of these operating principles, which Percy calls policy refinement, is set out in regulations.

The importance of these distinctions is that Congress made an attempt to balance the various competing interests in particular contexts to achieve what it considered to be a fair approach to implementing a public policy of full integration of disabled people. In contrast, under the Rehabilitation Act the interest balancing was done by regulations prepared by bureaucrats, not Congress.

In Canada the legislators have set out the organizing principle related to human

8. See text accompanying fn. 89 in chapter VII.
9. See text accompanying fn. 90 in chapter VII.
10. See text accompanying fn. 93 in chapter VII.
rights and disability. The public policy is non-discrimination subject to the existence of a *bona fide* justification. Different operating principles are required for different economic and program sectors but the legislators have given no directions to guide the necessary policy refinement.

I will use private sector provision of services other than transportation to illustrate what a set of operating principles for this economic sector might include.

ii. Services Provided by Private Entities:

In this section I will propose operating principles to be applied to services provided by private entities other than transportation companies.

I think it is clear that the outcome of a complaint against a small sole proprietor corner convenience store and, for example, a 7-11 franchised convenience store would be different. The reason for this is simply a matter of the cost of renovations as a percentage of revenues. A raw cost figure alone would not assist in determining whether the refusal to make renovations to remove structural barriers would be a *bfj* but one can see that the cost/revenue ratio would be very different for the two types of enterprise. However, the only direction the legislation gives for handling these two very different situations is the *bfj* defence.

My concern here is to balance the requirement that accessibility be the long term norm while recognizing that the economics of small businesses, like the corner convenience store or the boutique in an historic tourist shopping area, may create special problems with making their premises accessible immediately or at all.

The organizing principle, which is the basis of existing human rights legislation, is that private entities which provide services to the public shall not discriminate against disabled customers.

The operating principles applicable to existing private entities carrying out business
Proposals for Improved Implementation

in existing premises might be formulated as follows:

1. **Individuals have the right to equally effective delivery of services in the most integrated setting possible.**

   This operating principle defines the concept of equality which is required to implement the organizing principle. A non-discrimination public policy could lead to other policy options, such as "program accessibility" or "separate but equal", which were adopted at times in the United States. This principle adopts the equally logical policy choice of integration. Integration is to be the usual way of providing services without discrimination.

2. **It is not discrimination to deny service, or provide the service in a different manner, if there is a bona fide justification for the denial or differential treatment.**

   A *bfi* is composed of a subjective and an objective component. The denial must be because of a sincerely held belief that it is necessary to avoid endangering the individual, other people, or company property and must be, objectively, reasonably necessary to achieve a legitimate objective.

   The *bfi* defence should apply to both direct and indirect discrimination. I agree with Mr. Justice Sopinka when he said, in *Alberta Dairy*,\(^\text{11}\) that distinguishing between direct and indirect discrimination for the application of the *bfor* defence is not supported by the wording, or by necessary implication, of the statute. The same logic applies to the *bfi* defence. Making it clear that the defence applies to both direct and indirect discrimination would remove an unnecessary complicating factor in the law. It should also be made clear that the *bfi* defence includes a requirement for reasonable accommodation. There is a consistent line of dissenting judgements by the Supreme Court of Canada in relation to the *bfor* defence which incorporate a duty to accommodate within the *bfor* defence. The judgement in *Dickason*\(^\text{12}\) blurs the distinction between

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direct and indirect discrimination even further and, in my view, there is no compelling reason not to simplify the law by eliminating the artificial distinction which is currently made between them.

I propose that the standard for the objective element of the \textit{bif} defence be one of reasonableness. An alternative standard, that the requirement must be "essential" to achieve a legitimate objective, has been proposed by the Canadian Human Rights Commission.\textsuperscript{13} This standard has been rejected by the courts. Accessibility rights, as with all other rights, do not override all other considerations. If the standard was to be that the refusal had to be "essential" to a legitimate objective I predict that the meaning of the word would be watered down to become "reasonable". After all, for example, it is not essential that the rate of return on investment be \( x \%), it could be half of \( x \). But this approach ignores the fact that accessibility rights are constrained by other interests of society. Reasonable necessity is within the realm of practical and legal possibility. Even with a \textit{bif}, reasonable accommodation short of undue burden would be required.

3. \textit{Within the context of the integrated provision of the service, the service provider must reasonably accommodate those individuals who need further accommodation, unless the accommodation would be an undue burden. This includes making reasonable modifications to policies or practices and providing auxiliary aids and services unless the service provider can demonstrate that such accommodations are not possible without fundamentally altering the nature of the service provided or the accommodation would be an undue burden on the entity.}

I have used the phrase "undue burden", which is the language used in the \textit{Americans with Disabilities Act, 1990} (as distinguished from "undue hardship" which is the modifier used in the \textit{ADA} in the context of employment), as the modifier for reasonable accommodation. I do not think anything necessarily turns on the difference

\textsuperscript{13} \textit{BFJ} Policy.
but since the provision of services is to be subject to a regulatory implementation strategy it may be better to make a distinction in the modifier between employment and services.

This standard requires more than mere negligible effort. The word "undue" implies that some degree of burden is acceptable.\(^{14}\) What would constitute reasonable accommodation is a question of fact dependant on the facts of a particular situation. Some of the factors to consider in assessing the reasonableness of the proposed accommodation would be: financial cost, degree of disruption to normal operating procedures, the size of the operation and number of service outlets, and the safety of the disabled individual, employees, and other patrons.\(^ {15}\)

\textit{Howard v. University of B.C.}\(^ {16}\) is an example of having to provide auxiliary services within an integrated setting. The complainant, a student, was entitled to have a sign language interpreter provided by the university since the university was providing the service of education. This principle should also cover the \textit{Eldridge v. British Columbia (Attorney General)}\(^ {17}\) situation. It would require doctors to absorb the cost of a sign language interpreter as part of the overhead costs of providing the medical service.

4. \textit{In cases where integrated provision of the service is not possible, the service provider must provide equally effective delivery of the service in a different way unless the service provider can demonstrate that no alternative delivery mechanism which is equally effective exists without fundamentally altering the nature of the service provided or would be an undue burden.}

This principle may require the inaccessible corner convenience store to take phone orders from disabled people and bring the merchandise outside to conduct the business. Or a buzzer system could be required to call the store attendant outside to take an order.

\(^{14}\) See text accompanying fn. 123 in chapter V.

\(^{15}\) See text accompanying fn. 121 in chapter V.


\(^{17}\) (1993), 75 B.C.L.R. (2d) 68. See text accompanying fn. 19 in chapter VI.
5. *Where reasonable accommodation requires subsidizing the provision of the service to the disabled person or his/her attendant the service provider may require reasonable proof (authentication) of the individual's special needs.*

The usual situation would require the service provider to reasonably accommodate an individual without proof of need, although a request would have to be made in order for the entity to know accommodations were needed. In cases where the accommodation involves a subsidy it is reasonable to require reasonable authentication of need.

6. *All service providers must prepare adaptation plans.*

All service providers would be required to prepare adaptation plans to compel them to consider the problem of accessibility. These plans would be subject to the limitations set out in this set of operating principles for service providers.

7. *Where the barrier to access is architectural or structural the service provider whose gross revenues are less than $50,000 a year must remove the barriers where such removal is readily achievable. The "readily achievable" standard requires minor structural changes which would be insignificant in terms of cost, effort, or disruption to the business. This term, which is inherently indefinite, should reference the nature and cost of the action, the financial resources, size, number of employees, and number of service outlets of the entity and the type of operation. Where the removal of these types of barriers is not readily achievable, the entity must provide the service by alternate means if possible. Readily achievable means the cost is less than 1% of annual revenue.*

This operating principle reflects the economic reality of small businesses. These are often located in old buildings with living quarters attached. Rather than waiting for a complaint and expecting the *bif* defence to be successful society should decide that the economic interests of these small entrepreneurs justify limiting the general policy of non-discrimination. To avoid leaving the decision about how much cost is too much to the regulators the legislators should make that determination.
Proposals for Improved Implementation

This idea is taken from the *Americans with Disabilities Act, 1990*, but unlike the U.S. model, which applies to all service providers, I would restrict it to small businesses. The actual numbers I have selected would have to be confirmed by a study of the businesses in question to determine their profitability and how much surplus cash (beyond the need for the owner and employees to be able to gain a living wage) they generate.

The long term objective is to eliminate inaccessible buildings without placing an undue burden on struggling small businesses. Although it may be argued that this reduces the rights of disabled people, the majority of these small businesses are operated by women and new immigrants who also face disadvantage. It is important in all situations that the rights of one group do not adversely affect the interests of other disadvantaged groups.

8. *If such a small business made renovations which changed the entrance or moved to a new building the renovations or the new building would have to be readily accessible to and usable by disabled people.*

The objective is to stop using buildings which are inaccessible. The owners of these buildings would have to find some other use for them than service to the public.

The *Americans with Disabilities Act, 1990* requires that new structures be readily accessible to and usable by disabled people unless structurally impracticable and significant renovations must meet this standard to the extent feasible. New buildings designed to house businesses which serve the public should be held to the highest accessibility standards and if this is structurally impracticable then the design should be changed. If a new business intends to start up in an existing building that building should be renovated to the readily accessible standard. If it cannot be then the business will have to look elsewhere and the owner of the building will have to find another use for it.

The consequences of the failure of the legislators to provide greater guidance on

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18. See text accompanying fn. 90 in chapter VII.
the exact meaning of the non-discrimination public policy have been that implementation has been delayed and basic policy issues remain unresolved. Operating principles are policy choices made from the various options which the general organizing principle could allow. To illustrate the idea, I have proposed a number of operating principles applicable to the provision of services other than transportation. They balance accessibility rights with the interests of other groups. They are designed as interim measures until accessibility becomes the unremarkable expectation.

**B. The Need for Agency Coordination:**

A high level of coordination among the various agencies which affect accessibility rights is required for their effective implementation. Once the essential organizing and operating principles are established for a particular type of undertaking, all the organizations which have an impact on that undertaking must coordinate their activities in policy refinement, diffusion, and execution to ensure that each element of the system is taking action to complement the initiatives of related agencies.

To illustrate the need for extensive coordination and cooperation among the entities which have an impact on any particular system in order to effectively implement change I will discuss the role of building codes in implementing accessibility rights, with particular reference to British Columbia.

The authority to promulgate standards for the construction of buildings rests with the provincial governments. In 1941 a National Building Code was issued by the National Research Council as a model which could be adopted by provincial governments. Since 1991 the Canadian Commission on Building and Fire Codes, a part of the National Research Council, has been responsible for updating the model National Building Code. This Commission has a standing Committee on Barrier-Free Design which is responsible for reviewing s. 3.7 of the National Building Code, which deals specifically with standards
for accessibility, and developing recommendations for revisions to this section. Six jurisdictions have adopted this model section without change,\(^{19}\) 5 have modified and expanded it,\(^{20}\) and one, British Columbia, has adopted its own unique section on barrier-free design.

In 1988 Public Works Canada asked the Canadian Standards Association to develop a barrier-free design standard using the American National Standards Institute's "Specifications for Making Buildings and Facilities Accessible to and Usable by Physically Handicapped Persons." The CSA is a private national organization. The CSA issued the model standard, "CSA B651 Standard on Barrier-Free Design", in 1990. This standard was adopted by the federal Treasury Board to apply to federal government buildings but the Provincial Territorial Committee on Building Codes has passed a motion refusing to reference the CSA B651.

In addition, the Saskatchewan Human Rights Commission developed and published "Accessibility Standards Guidelines" in 1980 which differ from both the National Building Code and the CSA standards. Newfoundland has published its own standard for accessibility composed of a combination of the National Building Code, the CSA Standard, and its own requirements. Manitoba has issued bulletins on accessibility which include requirements not in the Building Code.

While it is most important to ensure that the regulatory agencies within a jurisdiction coordinate their activities, there are practical concerns arising from having different standards among the various jurisdictions. First, disabled people, as they travel across the country, experience different types of accessibility features which causes confusion and creates an obstacle to safe travel. Second, national businesses and organizations must be aware that there are different requirements in each jurisdiction and

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20. Alberta, Ontario, Manitoba, Saskatchewan, and Quebec.
be prepared for the extra cost of checking and conforming to local requirements. Third, it is an inefficient duplication of effort to develop multiple standards to deal with essentially the same problem. While a uniform standard across the country would no doubt increase the safety of travel and be more cost efficient, the Constitution does not allow for the imposition of a single national standard. Variation among the provinces in areas under provincial jurisdiction is a feature of Confederation and provincial power is jealously guarded.

Inter-agency disputes exist even with the same jurisdiction. For example, within the federal sphere different standards apply. The federal government has adopted the CSA standard while other entities under federal jurisdiction are subject to the National Building Code. The Saskatchewan Human Rights Commission accessibility Guidelines are different from requirements in the Uniform Building Accessibility Standard. The Standard has the power to grant exemptions from the SHRC Guidelines but the Human Rights Code has paramountcy over the Standard. Building owners who have obtained permits under the Standards are understandably unhappy when the Commission finds them in violation of its Guidelines. The Manitoba Human Rights Commission has issued accessibility "bulletins" which have different requirements from the Building Code but there is no liaison with the provincial Building Code officials.

The accessibility studies done by the Canadian Human Rights Commission assessed accessibility against the CSA standard. As was seen, even government offices do not meet this standard. The Provincial Territorial Committee refused to reference this standard. Was it because the CSA standard is so stringent that the provincial governments did not want to impose the cost of meeting those standards?

The British Columbia Building Code is published as a regulation under the
Proposals for Improved Implementation

Municipal Act\textsuperscript{22} and may be adopted by local governments. Studies by the B.C. Coalition of People with Disabilities (B.C.C.P.D.) and the B.C. Premier's Advisory Council for People with Disabilities (P.A.C.) found that the Building Code has not been adopted by all municipal and regional district governments. The B.C.C.P.D. study showed that municipalities would welcome a provincial direction that they adopt the Code. Provincial government action is needed to impose the Code on all local governments which are responsible for the day to day enforcement of the Code. Agency coordination does not happen automatically. It needs a vigourous push which is most effectively administered by a statutory duty.

The need for multi-agency coordination first occurs at the policy refinement stage. The story of building codes illustrates the typical lack of coordination. The U.S. disability statutes have always required the standard setting agencies to coordinate their standards and ensure they are complementary. The two approaches used were to require joint standard setting or directing a lead agency to issue regulations which would then be incorporated into separate regulations issued by implementing agencies.\textsuperscript{23} The lead agency approach was found to be the more efficient mechanism. In my opinion, it is more appropriate to task a lead agency with responsibility for policy refinement and impose on that agency a duty to coordinate input from other relevant agencies. The human rights commissions should be partners in the preparation of the standards, but the specialist agencies should have the legal responsibility.\textsuperscript{24} These standards would have to meet the requirements of human rights legislation and compliance with them should be a sufficient defence to a complaint (subject to adaptation planning). Otherwise people do not know

\textsuperscript{22} R.S.B.C. 1979, c. 290, s. 740, as amended by the Building Safety Standards Act, S.B.C., 1981, c. 11, s. 37.

\textsuperscript{23} See text accompanying fn. 30 and 57 in chapter VII.

\textsuperscript{24} S. 24 of the Canadian Human Rights Act, R.S.C. 1985, c. H-6, provides that regulations may be made respecting accessibility for disabled people and where this standards are met no complaint may be filed. No regulations have been issued under this section.
what to expect or what they are required to do.

The next stage in policy implementation is *policy diffusion*. This is the process of communicating the policy refinements to the relevant actors in a system. In the case of building codes this would include architects, engineers, contractors, and building code inspectors. Since code requirements already have to be communicated to all these actors, additional requirements related to accessibility rights should be communicated through the already existing systems.

Policy diffusion remains a key problem in the area of accessibility rights. Even the basic organizing principle of non-discrimination is little understood. The P.A.C. report found that there remains an attitude that access is a "nuisance" and it is treated, if considered at all, as a separate issue.\(^{25}\) Commenting on the architect portion of the system, P.A.C. suggested two reasons for this are that architects are not sufficiently sensitive to the issue and are not held accountable for designing inaccessible structures. Accessibility rights must be considered as an integral element at each stage of the process of constructing a building.

In reference to the P.A.C. comment on architects, implementation of this public policy is directly affected by the ability of architects to incorporate barrier-free design into their work. Architects have a responsibility to their clients to design buildings which meet all the requirements imposed by law, but there is currently no mandatory component of an architect’s education dealing with barrier-free design. Schools of architecture and their professional governing bodies, as parts of the system by which buildings are constructed, should be required to include barrier-free design in the regular curriculum and their continuing education programs. This example shows that after the government has established the standards for accessibility these standards have to be communicated to and understood by the people who are subject to them. It cannot be assumed that even closely

25. *Recommendations for Improving Compliance with Section 3.7 of the B.C. Building Code.*
related entities are aware of what each other is doing.

Another player in the system of constructing buildings who must be aware of the standards is the building inspector. Surprisingly, the P.A.C. report had to recommend that standardized qualifications for building inspectors should be established and that these include knowledge about the requirements of accessibility.\textsuperscript{26} The building inspectors are an integral part of the government's system to regulate building practices to ensure safety and compliance with the law and yet they are not trained in the accessibility requirements of the Code they enforce!

Policy diffusion is essential to the efficient implementation of any public policy. Since the government makes public policy it has the primary duty to ensure that people subject to the policy are aware of it. However, government agencies cannot implement their mandates, including the diffusion of policy decisions, without sufficient funding. Given the pressures to reduce budgets at all levels of government, an agency which tries to obtain money for activities that are not specified in its enabling legislation will find its requests receiving a low priority. To encourage the government to provide the necessary funding a request based on a clear statutory duty to undertake the activity gives the funding request a much higher priority in the budget debate. Section 506 of the \textit{Americans with Disabilities Act, 1990} requires the Attorney General to develop a plan to assist covered entities in understanding the requirements of the \textit{Act} and that the responsible agencies prepare technical manuals for use by covered entities. Similar duties imposed by legislation on human rights commissions (and other regulatory agencies) would strengthen their arguments for sufficient funding during the annual budgeting process.

The final stage in Percy's model is policy execution. Responsibility for compliance with s. 3.7 requirements currently is divided among owners, builders, municipalities, and

\textsuperscript{26} Ibid.
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building inspectors. The P.A.C. report recommended that the responsibility of building inspectors be clearly established.\(^{27}\) In my view, these inspectors should be made clearly responsible for certifying that all requirements of the building code are met including accessibility requirements. There are already provisions in the Municipal Act\(^{28}\) and the Vancouver Charter\(^{29}\) allowing bylaws to be passed which would require applicants for building permits to provide the municipality with a certification by an architect or engineer that the plans conform to the provincial Building Code. Local governments which do not want to train their inspectors to the degree necessary may pass on the cost of ensuring building plans meet all accessibility requirements to the applicant. If the government does not want to pass on the costs of certification to applicants it must at least clearly define the duties and responsibilities of each of the players and properly train them.

Although the public policy related to discrimination and disability is found in human rights legislation, the implementation of this policy requires a multi-agency response. I have used building codes as an example of other systems which already exist to undertake the policy refinement, diffusion, and execution processes. These agencies have the special skills required to implement the policy and there is no reason for human rights commissions to try to duplicate those skills. The only way such a significant policy change can be implemented is to incorporate it into the many systems which already exist to regulate society.

C. New Implementation Strategies:

As was seen in chapter V, human rights legislation prohibits discrimination against

\(^{27}\) Ibid.

\(^{28}\) R.S.B.C. 1979, c. 290, as amended by the Municipal Affairs, Recreation, and Culture Statutes Amendment Act, 1990, S.B.C. 1990, c. 59, s. 2. which added s. 734.2.

\(^{29}\) S.B.C. 1953, c. 55, as amended by An Act to Amend the Vancouver Charter, S.B.C. 1984, c. 32, s. 10, which added s. 306,
disabled people in the provisions of services unless such discrimination can be shown to be based on a *bona fide* justification. Exactly what constitutes a *bf* is somewhat uncertain. One of the factors which is considered is the cost of eliminating the barrier to access. How much cost, and how it is to be calculated, remains uncertain but clearly cost will be used to limit the scope of the guaranteed rights. The statutory complaints based enforcement strategy, which requires a complaint of discrimination, also reduces the effectiveness of human rights legislation, especially in the area of accessibility rights.

I have already talked about the need for the legislatures to establish operating principles to give real substance to the general prohibition against discrimination. To illustrate this idea, I set out a number of operating principles for services other than transportation. Those proposals significantly change the current requirements for those services operating with the current stock of buildings and equipment.

The denial of accessibility rights is a systemic problem. Systemic discrimination in employment has been understood for many years. With accessibility rights the same systemic discrimination processes occur within service entities but the problem is magnified by the numerous systems outside the direct control of any particular entity. Implementation of accessibility rights requires a systemic approach which will prompt changes in every system which affects these rights. The responsibility for implementation must be integrated into the routine activities of each relevant sub-system.

In this section I propose additional strategies for the implementation of accessibility rights by self-regulating professions, enforcement agencies other than human rights commissions, and human rights commissions.

i. Self-Regulating Professions:

There are various self-regulating professions which can impose standards of conduct on their members. Respect for accessibility rights is no different in theory than
respect for any other legal requirement. Professional standards and disciplinary action can be used to regulate various professions which have a direct bearing on the implementation of accessibility rights.

I have already discussed the need for clear standards against which to measure accessibility rights. The ad hoc development of standards by tribunal and court decision is a slow and inefficient method for determining exactly what the face of equality looks like. Standards must be promulgated by government agencies setting out the minimum requirements for accessibility. There are already many standards for building accessibility which could easily be consolidated and re-issued as the minimum standards for new construction and major renovation. Standards for transportation vehicles are less developed, but significant work is being done through Transport Canada studies and grants, and the U.S. requirements will press that industry very quickly to design appropriate vehicles.

Once the standards are in place then the existing systems which train and govern many professions can be adapted to meet the new requirements. The self-regulating professions should be required to incorporate accessibility rights into their required examination subjects and their standards of professional conduct.

I will use building codes and architects to illustrate the principles involved. The building code is the instrument which should establish the standards for accessibility for buildings. There are already several models for state of the art building code requirements to maximize physical access. The various codes should be brought up to date and issued as the minimum standards required for human rights purposes. Since the ability to improve accessibility rights will continue to develop over time it is clear that there may be improvements which are better than any particular code. That is why I suggest there be a minimum standard to meet the legal requirements: entities could choose to apply higher standards until those improvements were incorporated into the building codes. Entities which meet the minimum standards should not be held liable for discrimination.
Improvements which are later added to the standards would be implemented through the adaptation planning system.

Architects have a direct impact on accessibility rights. Previously, in the discussion of the need for effective policy diffusion, I noted the P.A.C. study\textsuperscript{30} which found a persistent attitude that accessibility rights were a "nuisance" rather than essential principles of fundamental human rights values. The study noted that there was no mandatory curriculum on barrier-free design in professional schools. The study team held preliminary discussions with the University of British Columbia School of Architecture on appropriate ways to increase students' understanding of the issues and experience in preparing barrier-free designs but the issue has not been settled.

The Architectural Institute of British Columbia is the professional body which regulates and licenses architects.\textsuperscript{31} The Institute sets out the requirements for architects to obtain liability insurance, be registered, etc. It also can establish the course of study required to be an architect and set professional examinations.

Architects already have a duty of care to their clients to design buildings that will not fall down. The \textit{Architects Act} should be amended to add a duty to ensure that building designs conform to barrier free design standards. This places the enforcement responsibility where it properly lies - with the person who is responsible for the design. Barrier free design is by now a sufficiently known concept that architects cannot plead ignorance. It means that accessibility problems would be generally caught before building starts. This change would pressure the Institute to make barrier-free design a required part of the course of study and examination subjects before a person could be registered as an architect. This would immediately compel schools of architecture to incorporate barrier-free design into their curriculum.

A side effect would be to change the cost factor in the \textit{bif} defence. If failure to

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\textit{Supra}, fn. 25.
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make a barrier-free design is negligence, then the cost of renovations to correct a mistake can be passed on to the architects' insurance company. If a human rights tribunal determined that a respondent had discriminated by denying access due to physical barriers, if architects had a clearly defined duty of care and standards against which to measure the standard of care, the respondent would be able to sue the architect for negligence and this new source of revenue would significantly change the cost analysis.

Although the change I have proposed may alter the assessment of the cost factor in terms of remedying a violation of rights, the primary purpose of the change is to prevent the construction of inaccessible buildings. By holding architects liable for failure to implement barrier-free design requirements the self-regulating profession, which knows the various systems which make up the environment within which it functions, would respond by making the necessary changes to correct the weaknesses within its particular environment.

A similar approach should be taken for other professions which have a direct impact on accessibility rights. For example, engineers who design public transportation vehicles such as buses and trains or who design public spaces such as sidewalks or bridges, could be held accountable for failing to know about the most up to date design in order to maximize accessibility. The *Engineers and Geoscientists Act*, as with the *Architects Act*, establishes a professional licensing body which can set requirements for training, examination, and professional standards for engineers.

ii. Alternate Enforcement Agencies:

In keeping with the principle that accessibility rights should be integrated into systems which currently exist for the enforcement of standards, those systems must be an

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32. *Engineers Act* R.S.B.C. 1979, c. 109: the name was changed by the *Engineers and Geoscientists Act*, S.B.C. 1990, c. 41.
integral part of the implementation strategy for accessibility rights. Each jurisdiction has specialized agencies to regulate various industries. Human rights commissions should not usurp the functions and authority of other agencies more specialized in particular subject areas. Human rights commissions do not contain independent expertise on all the subjects which relate to accessibility rights. Not only will they never have those resources they should never have them. They are the wrong forum for setting standards, educating the various disciplines about them, and enforcing them. Commissions should review proposed standards to ensure compliance with human rights principles, investigate complaints about lack of access including the standard itself and the application of the standard to a particular situation, and order remedies for particular violations of human rights law.

Three jurisdictions recognize this principle by including in their human rights legislation a provision allowing the commission to refuse to deal with a complaint if it could be better dealt with under another Act.\(^3\) For example, the *Canadian Human Rights Act* provides that the Commission may decide that a complaint "is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act."\(^4\)

An example of an already existing system which was modified to incorporate accessibility issues into its mandate is the National Transportation Agency (NTA). This Agency, established by the *National Transportation Act*,\(^5\) originally was responsible for the economic and safety regulation of certain modes of transportation and empowered the NTA to inquire into complaints about undue obstacles to mobility and order appropriate remedies. In 1988 the *Act* was amended to enlarge the Agency's powers to inquire, on complaint or by its own initiative, "whether the manner in which a service is being

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33. Canada, British Columbia, and Ontario.
34. R.S.C., 1985, c. H-6, s. 41(b).
provided by a carrier constitutes an undue obstacle to the mobility of disabled persons.  

The amendments allowed the NTA to issue regulations dealing with accessibility to transportation, undertake inquiries respecting the carriage of disabled people, and inquire into individual instances where a person encountered an undue obstacle to transportation. If the Agency finds that there was an undue obstacle to mobility it may order corrective action and order the reimbursement of expenses incurred because of the obstacle.

The Act specifically requires the Agency to coordinate its activities with the Canadian Human Rights Commission "in order to foster complementary policies and practices and to avoid jurisdictional conflicts".  

The NTA is a more specialized agency which has much more knowledge about transportation issues than the Human Rights Commission. With general input by the Commission to ensure human rights principles are understood and incorporated into its work, the NTA is better placed to apply those principles to the complexity of the various modes of transportation. The NTA already has access to the specialized disciplines which deal with transportation issues. Since the NTA is intimately involved with the industry and continuously reviews and revises regulations it can intervene to prevent an accessibility problem or correct it in the ordinary course of its work.

In British Columbia, the Motor Carriers Act provides for a Motor Carriers Commission which is responsible for licensing and regulating public and private road transportation. Since this Commission will already have extensive knowledge of the transportation industry and transportation technology, minor amendments to its enabling legislation would make it an ideal agency to regulate accessibility standards for these  

37. Ibid, s. 2, adding sections entitled Transportation of Disabled Persons. S. 63.2 now provides: 

The Agency and the Canadian Human Rights Commission shall co-ordinate their activities in relation to the transportation of disabled persons in order to foster complementary policies and practices and to avoid jurisdictional conflicts.  
38. R.S.B.C. 1979, c. 286.
modes of transportation.

Building codes are enforced by provisions for building inspectors to certify compliance with the requirements of the codes.\textsuperscript{39} These inspectors are already part of the system which architects and contractors are familiar with and they have an established role. Their intervention can occur before construction has progressed too far or even started. In this sense building inspection is a system to prevent accessibility problems. Despite this system, and the building codes which purport to require all newly constructed buildings designed for public use to be accessible, buildings are still being built which are not accessible, or which do not provide equality of accessibility. Not only are the codes often not sufficiently stringent to ensure full accessibility, the codes are poorly enforced,\textsuperscript{40} in part, as already discussed, because of the weaknesses in the systems for policy diffusion.

The study undertaken by the B.C.C.P.D.,\textsuperscript{41} although declaring the provisions of the Code to be "excellent", concluded that improvements were required. The most substantial problem is that the Code provisions do not apply to renovations. The P.A.C. study also found its provisions generally "excellent" but did make a number of recommendations on how to improve the barrier-free design elements of the Code and particularly criticized the fact that it does not apply to renovations.\textsuperscript{42}

These studies raise the question of minimum requirements versus state of the art requirements. What is the standard against which a human rights complaint is assessed? It seems that a building code would be subject to a human rights complaint or \textit{Charter} challenge if it does not impose the minimum requirements for accessibility rights. Additional requirements may be adopted by choice but using state of the art requirements which are not part of the building code for assessing discrimination complaints seems to

\textsuperscript{39} Supra, fn. 28 and 29.

\textsuperscript{40} Pathways to Integration: A Report on Accessibility for Persons with Disabilities in Canada.

\textsuperscript{41} Ibid.

\textsuperscript{42} Supra, fn. 25.
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me to be unreasonable. The higher standard is a matter of choice; the minimum requirement is a matter of law.

If a code requirement is not good enough should a building owner be able to rely on the code as a defence to the complaint of discrimination? Until a code is revised in the context of setting out the minimum requirements under human rights law, building owners should not be allowed to use the code provisions as a defence to a complaint of discrimination. There is an appearance of unfairness in this proposition but the codes have not been analyzed specifically in the context of human rights requirements and most are to a greater or lesser extent unsatisfactory. Building owners may want to consider this sufficiently unfair that they lobby the government to revise the code to meet human rights standards.

It seems to me that the solution to the problems of building codes and their enforcement is to modify the codes and their enforcement systems, not try to pass on the responsibilities to human rights commissions. The building codes must set out the minimum accessibility requirements which human rights principles require. Where a government fails to ensure the building code meets human rights requirements a complaint should be filed against the government (assuming that the particular human rights commission has the power to force the government to make the necessary changes). The institutions which rely on the building codes for directions on construction should be entitled to rely on them. To put political pressure on governments to ensure their codes adequately impose accessibility requirements, human rights legislation should be amended to make it clear that a building owner can add the government as a party to an accessibility complaint and force the government to share the cost of fixing the problem of the cause of the violation is a fault in the code requirements.

Legislation is also required to clarify the responsibilities of the building inspectors. In the current system the responsibility for ensuring the building code is followed is divided among the building inspectors, the contractors, and the owners. The result is that
no one really is responsible. If building inspectors are to be the primary enforcement officer for accessibility rights they must be given the responsibility and powers necessary to do the job.

My proposal that the primary enforcement agency be the already established regulatory agency for the industry may raise concerns about regulatory capture. However, the same argument applies if the human rights commission retains a primary enforcement role. Someone has to undertake the policy refinement exercise and this requires developing appropriate relationships with the regulated industry. While there is a need to keep a watchful eye out to prevent regulators and the regulated from being too close, Percy observed that the concept of capture itself is often part of the political struggle over the choice of fundamental policy issues. He said:

When describing the aggressiveness and dispatch with which agencies move to enforce regulations, two predominant, and contradictory, views emerge. One perspective holds that agencies often act slowly and cautiously in enforcing regulations, generally as the result of close relationships with regulated clients. In the other view, regulatory agencies are depicted as "expansionistic", "imperialist", and autonomous in developing and implementing regulations. From this latter perspective, regulation is seen as "out of control" and insufficiently subjugated to political accountability.

To solve a systemic problem a systemic remedy is required. It is necessary to integrate human rights into the ongoing work which takes place within the systems which already exist. Where there is already a regulatory system in place to regulate an industry that system should retain the primary responsibility for human rights enforcement. The role of the human rights commission should be to provide input on human rights principles which the more specialized entity can then integrate into its normal activities. The human rights commission would continue to investigate complaints and would intervene where the alternate system has failed to properly implement human rights requirements.

43. Ibid.
44. Supra, fn. 3, at p. 41.
iii. A Regulatory Human Rights Enforcement Model:

To complement the current enforcement strategy based on complaints which human rights legislation uses, I propose that a regulatory strategy be added. To illustrate the difference between a complaint based and a regulatory strategy to implement human rights public policy I will describe the proposal by the Canadian Human Rights Commission for the implementation and enforcement of the equal pay for work of equal value provisions of the *Canadian Human Rights Act*.\(^{45}\)

The Canadian Human Rights Commission believes there is an inherent contradiction in the social policy declared by s. 11 of the *Canadian Human Rights Act* and the enforcement mechanism. Equal pay is recognized as a systemic problem but enforcement is based on individual complaints. Pay inequality is a systemic problem deeply embedded in policies and practices of employment and compensation systems. However, an investigation must be limited to matters raised by the complaint even though the systemic nature of the problem may require ranging beyond the complaint parameters to truly understand and remedy the systemic problem. The Commission stated:

> A complaints system of enforcement is usually based on the assumption that violations of the standard of conduct set out in the Act will be the exception and not the rule. Indeed, the investigation of individual complaints is only feasible if breaches of the legislation are exceptional. Given the systemic and pervasive nature of pay discrimination throughout the economy, a complaint system of enforcement quite simply becomes overwhelmed.\(^{46}\)

The individual complaint approach inevitably results in uneven and erratic enforcement: "In the absence of a complaint, there is no cost to the employer of noncompliance and therefore no incentive to comply",\(^{47}\) which would require

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45. R.S.C. 1985, c. H-6, s. 11. This description is based on *The Canadian Human Rights Commission's Proposal for Reform of Equal Pay for Work of Equal Value Legislation in the Federal Jurisdiction*. Unlike the other provisions of the Act, section 11 includes some operating principles to give greater definition to the organizing principle of "equal pay for work of equal value".


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undertaking the costly exercise of correcting their pay systems. Although the Commission can initiate complaints it needs reasonable grounds to do so. The Commission does not have any inspection power to audit pay systems to find those reasonable grounds. The current system does create change but very slowly.

The CHRC has recommended that the legislation be changed so employers have a positive duty to comply without the need for a complaint. The CHRC proposed that employers "would be required to develop a pay equity plan to achieve compliance or to demonstrate that they were already in compliance with s. 11 and to file with the Commission a certificate of compliance." These plans would have to be completed and the certificates filed with the CHRC within two years of the coming into force of the necessary amendments. Employers failing to meet these requirements would be subject to a fine. The plans themselves would be monitored by audit and analysis of the pay information required under the Employment Equity Act. The right of an individual, union, or the Commission to file a complaint would be retained for those employers who still refused to comply after imposition of fines for failure to prepare plans or file certificates and for those employers whose plans were not acceptable.

This regulatory approach is thought to be more effective because it places employers in a situation where it can easily be determined if they have taken action to

48. The Canada Labour Code, R.S.C. 1985, c. L-2, s. 182, authorizes Labour Affairs Officers to inform the CHRC about apparent equal pay violations which are found during their routine inspections if the employer is not willing to correct the problem.

49. Since employers subject to the Act already have a duty to obey the law, the Commission must mean that the legislation should be changed to place new duties on employers which will demonstrate whether they have obeyed the substantive requirements of the law.

50. Supra, fn. 44, p. 11.

51. This model is already used in the Employment Equity Act, S.C. 1986, c. 31. This Act requires employers subject to it to prepare statistical reports on the representation of target group members in their workforces, deliver these reports to the government, and prepare "action plans" to correct under representation demonstrated by the reports. There is provision for a fine to be imposed for failure to prepare and deliver the statistical reports (but not for failure to prepare the action plan).

52. A similar approach to implementing pay equity was adopted in Ontario and Manitoba for some employers.
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correct pay inequalities. Since not all employers would be subject to audit immediately, the effectiveness of the plans would remain in doubt. However, since most employers would hire consultants to do the work there is a high expectation the plans would be acceptable. It places the primary burden of implementation on the employer and not on the human rights commission. The penalty for the easily observed failure to prepare a plan and file a certificate of compliance would remove any incentive to do nothing and hope a complaint was not filed.

The regulatory system I propose for accessibility rights is adaptation planning. This is a system which would require service providers to plan how they will accommodate the needs of disabled people in their current operations and how they will make changes to ensure accessibility and full integration over time. I propose that this regulatory enforcement model be added as a supplement to the existing complaints strategy of enforcing accessibility rights. In summary, this would require service providers to assess their activities for barriers to access and devise plans to correct the problems identified.

a. Adaptation Planning:

While disabled people have the right to physical access to services provided to the public, society (or at least the legislators) has chosen not to fully implement that right immediately. The concept of *bona fide* justification, with the incorporation of reasonable accommodation short of undue hardship, is the legal expression of that decision. The *bona fide* justification defence is strongly influenced by unstated concerns about costs. Since complaints are filed after the fact, when a structure has been built or an inappropriate major capital cost incurred, the cost of remedying the problem is often so high that the *bfj* defence succeeds because of the very discriminatory act which is the subject of the complaint.

Adaptation planning is an ongoing process of reviewing the way in which a service
is provided to identify and remove barriers to access which disabled people would experience if they tried to obtain the service. A significant portion of adaptation planning relates to the physical environment in which the service is provided. For a restaurant in a strip mall this would include considerations such as getting from the parking area to the front door, entering the restaurant, seating arrangements, and washroom facilities. For a transportation company it would include access to and within the ticketing and waiting areas, the process of boarding, and movement within the vehicle itself. In addition, adaptation planning requires a review of the policies and practices of the service provider. For the restaurant, it could mean ensuring that the menu is communicated to a disabled patron in an effective manner. For the transportation company, modifications to its policies and practices will be more complex. The company would have to consider questions such as how its ticket pricing policy affects disabled people (eg: can an attendant travel free\(^53\)), what additional help a driver would have to give a disabled passenger, and what kind of notice should a disabled person give before travelling.

Adaptation planning and reasonable accommodation are related but different concepts. Adaptation planning is designed to eliminate, as much as possible, identified barriers to access. There will always be things that no one thought about and people who still need accommodation. Adaptation planning does not change the service providers' duty to reasonably accommodate those people who still need accommodation.

Service providers would be required to submit a certificate to the human rights commission for their jurisdiction certifying they have done an assessment of all aspects of their activities and made a plan for correcting identified barriers to access. There would be a penalty for failure to complete the assessment and file a certificate of compliance. The right to file a complaint would remain for those service providers who refused to take corrective action or whose plans were incomplete.

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53. The National Transportation Agency has published proposed regulations dealing with attendant fares in the Canada Gazette for public comment.
One of the major concerns of the Canadian Human Rights Commission with the adaptation planning provisions already in the Act was that the Commission would never have the resources to become technical experts on accessibility and would never have the staff to review and critique each plan. The costs of assessment and planning how to eliminate identified barriers must be placed on the covered entities. The private sector will soon fill up with experts to hire as consultants. The most any enforcement agency could hope for would be to confirm that a plan had been made and to systematically audit the completeness of the plans. This is essentially the way that the Employment Equity Act is enforced by the (now) Department of Human Resources and Labour and the Canadian Human Rights Commission.

b. Advantages and Disadvantages of Adaptation Planning:

The primary advantage of a regulatory model using adaptation planning instead of a complaints model is that it forces the issue onto the corporate agenda. The U.S. Advisory Commission on Intergovernmental Relations found that competing policy issues, lack of leadership, and low recognition of the impact of barriers were serious impediments to implementing U.S. disability law. A service provider facing a penalty for doing nothing will be more likely to place the issue on the action agenda than one who does not think about the issue until a complaint is filed.

Adaptation planning is an implementation strategy to achieve full accessibility in the long term. It is based on an open recognition that limitations to accessibility rights are substantially a matter of cost control, not technological capacity.

The Americans with Disabilities Act, 1990 contains a general rule prohibiting covered entities from discriminating against disabled people. However, there are

54. See text accompanying fn. 105 in chapter VII.
provisions which limit this general prohibition when the cause of the discrimination is a physical barrier. In reference to buildings, it is discrimination to fail to take action to remove the barrier if such action is "readily achievable" which is defined as being "easily accomplishable and able to be carried out without much difficulty or expense." There is no requirement to ever do more. There are many special rules for transportation companies to allow for the phasing in of accessibility over periods of time, in some cases up to thirty years. These provisions reflect a blunt recognition of the cost of removing physical barriers and the policy choice to place cost above rights.

Adaptation planning is a method of prioritizing corrective actions so that the most people benefit the soonest. It allows an organization to plan how to maximize accessibility over time. An adaptation planning strategy would countenance continuing discrimination because of physical barriers but looks to the future and requires the service provider to consider accessibility in the long term - when the business is moved, when major renovations are contemplated, when technology changes to make reasonable today what was not reasonable yesterday.

Under the current complaints model the facility which is complained about will get fixed. But fixing a particular facility is not necessarily going to benefit the most people who would want to use the service and the remedy for a particular complaint would affect only the issue raised in the complaint. Under the current system a complaint is processed and a decision is made. If technology or the economic climate changes so that that decision is no longer valid the entire complaints process has to be gone through again. Adaptation planning would mean that a new complaint was not necessary. Since adaptation planning is an ongoing activity, as improvements come on the market or the economy changes the plans will be modified to take into account the new environment.

Adaptation plans require balancing competing interests. The same balance may

55. See text accompanying fn. 88 and 90 in chapter VII.
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not be appropriate in all parts of the country. Disabled people must be an integral part of the planning. They may choose among options. Some people will be dissatisfied with the choice, but once a choice has been made after fair and adequate consultation and debate the course of action is set in motion and can be changed only with difficulty. An example is the question of city public transportation. A parallel system may be considered better by the majority of disabled people rather than making the regular system accessible. If one cannot get to the bus stop because of the snow a parallel system may be preferred by the people who need it. Where snow is rare, the emphasis may be placed on an integrated system. People might prefer to wait several years for better accessible buses rather than press ahead with the current unsatisfactory accessible buses. Or, when considering an inaccessible government building, people may have a preference between merely adequate renovations now or moving to a new, fully accessible, location later.

Adaptation planning is a long term exercise. A key component which will affect the proposed time lines will be the question of cost. Cost will be assessed in relation to the capacity of the service provider to absorb the cost, taking into account revenue sources such as increases in the number of customers, increased resale value of property, avoidance of penalties, tax exemptions, and grants and subsidies. Cost includes both capital and operating costs. A service provider which operates from a number of different locations will have to distribute the costs throughout its whole operation.

The main philosophical objection to an adaptation planning approach to accessibility is that it countenances continuing discrimination. The reply to this objection is based on practical reality. The human rights process to date has had a minimal impact on accessibility rights. The most effective use of human rights law has been as a tool used by disability consumer groups to obtain improvements to physical access by political pressure. While Canada has not articulated the scope of reasonable accommodation without undue hardship, unlike the U.S. in the Americans with Disabilities Act, 1990, this does not mean that decisions are not being made implicitly based on the cost of remedying
the inaccessibility. It is the non-public nature of the human rights process which hides this fact.

It is not just in the area of accessibility rights that costs are taken into account when considering how to remedy discrimination. Another important example is equal pay for work of equal value. In both Ontario and Manitoba the equal pay legislation specifically permits phased in pay increases to remedy pay discrimination to control the impact on salary budgets. I do not see any advantage in pretending that cost does not affect the implementation of rights. It is better to debate the matter openly and reach a social consensus on the balance between rights and costs.

A second objection to the adaptation planning model is that it has been tried and it failed. The Canadian Human Rights Act contains provisions for voluntary adaptation planning. I have already described how this legislative initiative achieved nothing and is now moribund. The initiative failed because it was voluntary, there were no accessibility standards against which to assess plans, the plans were viewed by the Canadian Human Rights Commission as unwanted exceptions to the non-discrimination rule which should only be granted in special circumstances, and there was a total lack of agreement on what equality model to use. These reasons for failure disappear once the operating principles are clarified and adaption planning becomes mandatory.

The monitoring of implementation will initially be a significant resourcing problem for the various commissions. However, computers and data base programs are now sufficiently inexpensive that human rights commissions could obtain sufficient computer capacity to make the ongoing monitoring reasonably affordable. The auditing function is more responsive to funding levels. The greater the funding the more audits will be done.

While there were objections that adaptation planning was an exception to the non-discrimination rule we can now see that the human rights process has failed to create

56. See text accompanying fn. 72 in chapter IV.
significant change. The choice is to plan for change and see incremental improvements across the country or continue using an inefficient complaints based implementation strategy.

Adaptation planning requires an entity to devise a plan for the progressive modification of its services to ensure equal access to disabled people. The end product is accessibility, not a justification for continued exclusion.

c. Operating Principles for Adaptation Plans:

Although many aspects of adaptation planning would be governed by the operating principles established for the particular industry, there are also basic operating principles applicable to all adaptation plans.

1. Adaptation plans must include all types of disability.

   It is common for access issues to be considered only in relation to wheelchair users. This tendency has been criticized by other disability groups. An example of this, which is seen in many places, is the specially designed lift for wheelchairs beside a flight of steps. Apart from the matter of directing wheelchair users off the regular path of travel, the steps remain as a barrier to those with mobility limitations who do not use wheelchairs. Removal of the barrier caused by the steps should be seen in terms of easing access for everyone, including those with significant, moderate, and minor disabilities. The reason for this, apart from giving these people access, is that it increases the number of people who benefit from the renovation. In effect, it increases the return on the investment in accessibility rights.

2. Adaptation planning is an ongoing process. Covered entities must review their plans and submit revised plans and another certificate of compliance to the human rights commission each year.

   Adaptation planning is a process oriented approach to implementing accessibility
rights. The requirement to submit certificates of compliance each year ensures that the issue remains on the corporate agenda. As new technological advances are made and the economy changes methods to improve access and cost factors will change. Most adaptation plans will describe what are, in effect, interim activities. Changes to buildings or vehicles may not occur for several years. Until those changes occur, the plan will describe how the services will be provided to maximize integration.

3. **Services must be provided in the most integrated setting possible. Where services must be provided by alternate means, they must be provided through the least restrictive alternative.**

This principle recognizes that a duty to reasonably accommodate people continues regardless of the overall degree of accessibility. Some service providers will experience many instances where they have to accommodate people. In these cases the accommodation will be provided more efficiently if staff have established procedures to follow and these procedures can be included in the adaptation plan. In other service sectors, the need will be an unusual circumstance and perhaps the best that can be done in terms of planning is to ensure staff are properly trained regarding the legal duty to accommodate. One of the major barriers to providing accommodations is hide-bound employees who can do nothing more than follow the book!

4. **The plans must include adaptations to policies and practices as well as structural barriers.**

Barriers to equal access refer not only to physical obstacles which prevent access to buildings. Barriers exist when public address systems provide essential information and there is no accommodation for people who cannot hear (such as flight announcements) or important information is provided by signs without accommodation for blind people (such as signs directing pedestrian movement within buildings).

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57. See text accompanying fn. 118 in chapter V.
If part of the service is providing information in printed format (government agencies are major mailers of print information) that information must be available in a format accessible to blind and visually disabled individuals. The adaptation plan would describe how the existence of alternate formats will be made known to potential consumers and what the alternate formats will be. Preparing material in alternate formats is not particularly difficult once an established internal system is in place to remember to do it. My emphasis on the establishment of standard policies may sound somewhat bureaucratic but people need some way to remember everything and an established and consistent procedure is the best way for an organization to ensure its staff remember. For example, it took more than five years after the *Canadian Human Rights Act* was amended to prohibit discrimination against disabled people in the provision of services for the Commission itself to remember to always produce public information in alternate formats at the same time as it was produced in print. Every time the lack of alternate formats was brought to the Commission's attention, the responsible staff said they had forgotten and of course they would not forget again.

Technology is advancing rapidly in the area of information transmission to disabled people by television and at public meetings. Televised material can now be made accessible to visually impaired people with a newly developed service called "visual descriptive service". An assortment of methods to increase the access of deaf and hard of hearing people to information delivered by television and at public meetings are available.

5. *Adaptation plans must include staff training which must include general sensitivity to the needs of disabled people, proper techniques for assisting disabled individuals and handling their assistive aids, and the requirements for reasonable accommodation.*

Adaptation planning is a process to eliminate barriers to access for everyone. There will always be a need to reasonably accommodate individuals even in the most
integrated provision of services. Most people have no experience of disability. The employees who provide the actual services are no more likely to have such experience and will require training.

The National Transportation Agency determined that lack of staff training in the transportation network was an undue obstacle to mobility. One-third of the complaints to the Agency by disabled people dealt with inadequate, inappropriate, or unpleasant service. Forty percent of respondents to the NTA 1990 Passenger Survey said that the lack of staff training was either a "difficulty" or a "major difficulty" when they travelled.\(^\text{58}\) In response to this determination the NTA issued regulations related to the training of personnel working in the transportation industries it regulates.\(^\text{59}\)

The NTA regulations require employees and contractors of air, rail, and marine carriers and terminal operators subject to the National Transportation Act, who interact with the public to be provided with general sensitivity training and specific training related to assisting disabled people, handling assistive aids, and providing assistance with the operation of special equipment such as assistive video equipment and on-board oxygen. New employees must complete their training within 60 days of beginning work and receive periodic refresher training. Air carriers whose annual gross revenue is less than $250,000, air carriers whose operations are limited to the needs of a lodge operation, and proprietors of air terminals which handle less than 10,000 passengers per year and air carriers which serve only these airports are exempt from the regulations.

The regulations require that employees and contractors be provided with the training described in the regulations. Every covered entity must keep a copy of its current training program available for inspection by the NTA or members of the public. The regulations specify that the training program must include a description of the target

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group employees, the subject matters covered by the training program, the teaching
methods and types of educational and support materials, the number of hours of training
and retraining, the qualifications of the persons who provide the training, and the means
by which the organization ensures every employee receives the training and by which it
records and monitors when each employee received the training.

The regulations contain no special enforcement measures. The industry is highly
regulated and there is a clear expectation that the regulations of the NTA will be obeyed.

6. Adaptation plans must include target time lines.

The essence of the adaptation planning system is that accessibility rights are to be
phased in over time. Information about the timing of major re-locations, renovations, or
capital acquisitions may well be of interest to competing businesses. This may be an
unfortunate side effect of my proposal but many businesses already must provide
commercial information to regulatory agencies. Adaptation planning is a compromise on
the requirement for implementation of accessibility rights immediately. The compromise
includes many trade offs and the reduction of business secrecy is one that businesses will
have to put up with.

7. Adaptation plans must indicate which services, or elements of a service, cannot be
adapted to provide disabled people with equal access.

This provision recognizes that some services cannot be made accessible. Requiring
the entity to specify this will be a red flag for the human rights commissions to take a
careful look at the particular situation.

The first situation in which this might occur is with very small, and barely
profitable, service enterprises or with services that are provided solely from an
entrepreneur's home. If the necessary changes would fundamental alter or eliminate an
essential component of the undertaking then one cannot adapt the service. It would be
possible to exclude these enterprises from any requirement to consider adaptation
planning by setting a minimum number of employees or minimum gross revenue standard
but I think they should be integrated into the system because there may be scope for reasonable accommodation and technological change may make it possible to integrate disabled people in the future.

The second situation would arise when the service is to present historical buildings and equipment. It may well be impossible to balance the historical presentation with the needs of some disabled people.

Over the last decade employers have become increasingly familiar with a service called the "Job Accommodation Network". This is a privately run computer data base originating in the United States. Employers who have had experience with accommodating disabled employees enter data about their experience and solutions on the network which other employers can access to learn how other companies have managed to accommodate a wide range of disabilities. I expect that if adaptation planning becomes mandatory, so that enough enterprises have need of the information, a similar system would soon start to deal with adaptation planning. Small businesses, historical presentation services (whether it be the preservation of a building or site, or riding old transportation services), and human rights commissions could all have their imaginations stimulated by the experiences and efforts of others.

8. Adaptation plans are available to the public from the respondent entity.

The vast majority of the plans will not attract public interest. Disabled community groups which will be most interested in the plans will never have the resources to review more than a tiny percentage of all the plans submitted to the human rights commission. The plans of governments, crown corporations, and quasi-government entities such as universities or hospitals will attract the most attention. The few people who will want the plans may obtain them on demand at the expense of the entity not the human rights commission.

9. Adaptation planning by public agencies must be a public process.

Adaptation plans for public entities will involve some difficult policy choices
which, once made, will be hard to reverse. Since public agencies not only provide essential public services but also spend public money, the choices that will have to be made are matters of concern to the community as a whole. It is essential that the public have an opportunity for meaningful consultation and input to give the plan credibility with the public directly affected by the plan and the rest of the population who will have to contribute to the cost.

d. Adaptation Planning for Governments:

Governments and quasi-government entities are under strong political pressures to reduce spending. This fiscal squeeze will not end for several decades. It affects federal, provincial, and municipal governments as well as quasi-government entities such as schools, universities, and hospitals.

Governments have been as neglectful of existing legislative requirements respecting accessibility rights as private industry. I do not think it is satisfactory to leave the issue to the current complaints based human rights process because it means that money will be spent inefficiently to resolve individual complaints depending on where those complaints arise. It makes more sense to devise a planned approach to achieving accessibility starting with the changes that will benefit the most people. A different approach is required for governmental entities, as distinguished from private sector entities, because they control so many buildings that the costs of immediate action across the board are prohibitive.

Public consultations by the Manitoba Office for the Decade of Disabled Persons in 1987 identified significant problems with access to government services by disabled people. An inter-departmental Task Force on Facility Access was formed to respond to these concerns. The Task Force prepared a proposal for a way to prioritize renovations to buildings used to dispense government services. A rather complicated formula was
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developed to convert a number of qualitative and quantitative factors into a numerical code which, in turn, would categorize buildings by level of priority for renovations.\(^{60}\)

In addition to the organizing principles for adaptation planning already discussed, an additional principle applicable to governments and quasi-government entities would be that plans are devised by broadly defined service sectors, not each building. These service sectors could be defined, for example, as "court services", "corrections services", "university services" and so on. A single plan would be required for the "court services" sector or the "university services" sector so that province wide, or sector wide, activities could be carefully coordinated.

Within each sector the plan would prioritize buildings for renovation or replacement. The following discussion of a method to prioritize adaptations by these entities is based on the Manitoba proposal.

A lead government department would determine every location from which the service sector it is responsible for provides services to the public. Each location, whether leased or owned by the government, would be assessed according to 5 factors. These factors are the number of people who use each location, the type of service offered, the location from which the service is provided, the location's historic value, and the location's social symbolism. Each factor would be given a numeric value and the locations listed by rank order for prioritizing for a detailed accessibility study. Then a cost/benefit analysis of the necessary renovations would be done and a numeric value assigned. Then the locations would be rank ordered for action to ensure full accessibility which might mean scheduling the location for renovation or moving to an accessible building.

The assessment factors are discussed in the following paragraphs.

1) **The number of people who use the building.**

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\(^{60}\) *Facility Selection for Accessibility.* The government of Manitoba has taken no further action on this proposal. It should also be noted that the proposal was subject to criticism during public consultations.
The purpose of this factor is to determine how many people use the building. It would be useful to know the number of people who cannot access the building but who want to, the number who can access it but do so with difficulty, and the number who do access it. Satisfactory statistical information about how many disabled people would use the building if they could and how many can access the building but only with difficulty does not exist, in part because a history of inaccessibility will have taught disabled people not to come to the building. Therefore, a proxy for the number of people who could benefit from the renovations must be used. The raw total number of users is a useful starting point. However, the percentage of those needing to access the building who are disabled will vary depending on the services provided. This factor should consider both total number of users and an estimated number of disabled people based on the total number of users and the types of services provided.

2) **The type of service.**

The type of service delivered from the location is also a separate consideration which will affect the priority claim for renovations. Buildings used to provide services designed to deal with the special needs of disabled people would have the highest priority under this factor. Services related to immediate health and safety will rate a high priority. Involuntary use of services will require a high rating - courthouses, prisons, tax offices, police stations, etc. Recreational and cultural buildings would rank at the lower end of the scale.

3) **Location.**

The location from which a government service is provided relative to other service outlets is a relevant factor. If the same service can be provided at another, but accessible, location which is close to the same travel time and expense distance for the majority of users that building would have a lower priority than if there was no other location reasonably close. This factor should help reduce the typical rural-urban imbalance in government spending which is frequently seen in this country.
4)  **Historic buildings.**

There is a social benefit in retaining historic buildings. Where renovating for full access would significantly detract from the historic value of the building the service should be moved out of the building entirely. If a significant service is provided from an historic building which cannot be suitably renovated a high rating would be given. This rating is not to put the building itself high on the priority list but for spending the money to move the service elsewhere. Where the service is actually the use or touring of the building, accessibility will have to be measured in relation to the objective of retaining the historic value of the building and the degree to which to could be made more accessibility without diminishing its historic value.

5)  **The social symbolism of the building.**

The primary symbolic buildings are the legislatures and the courts. Making democracy and justice accessible to everyone should receive a high priority. In addition, every jurisdiction must ensure that all polling stations are accessible for every type of election.

6)  **The relative cost/benefit of renovating a particular building.**

After the locations used by a service sector have been ranked on the basis of the above five factors they are re-ranked by this factor. Buildings where larger benefits can be achieved with lower costs should have a higher rating. When establishing the priority list consideration should be given to whether renovations should be made to a few buildings to ensure full accessibility to all users or renovations should be made incrementally to provide the greatest relative accessibility for the greatest number of users. For example, it may be considered a higher priority to provide dignified access to the public galleries of a legislature and leave until later access to the floor of the legislature or the hearing rooms.
e. A Role for Complaints:

There must be an incentive for service providers to devise effective plans as well as penalties for failing to do so. The incentive would be that no complaint could be filed dealing with something covered by an audited adaptation plan. The whole purpose of the activity is to establish a regime of planned and incremental improvements in accessibility rights. Adequate plans should not be turned topsy-turvy by chance complaints.

Complaints dealing with accessibility rights would arise in three circumstances (apart from the failure to make a plan or file a certificate of compliance). After auditing of a plan by the human rights commission, a seriously deficient plan would be subject to a complaint initiated by the commission itself if the respondent refused to make the necessary changes. An individual or group of individuals might also file a complaint against a plan which is seriously deficient. A human rights commission or an individual or group of individuals might file a complaint in relation to some particular aspect of accessibility that a plan did not cover. Or a complaint might be filed that an adaptation plan was not being implemented as indicated in the plan.

Most of these complaints would be settled by adjusting the adaptation plan but if there was no agreement between the commission and the parties to the complaint the usual human rights enforcement mechanism would be available to impose an appropriate adjustment to the adaptation plan. In addition, a complainant would be entitled to an individual remedy to compensate for the discrimination experienced in the usual way. The respondent, after all, had a chance to avoid immediately liability through the adoption and implementation of an adaptation plan. If it did not avail itself of that opportunity it would not be allowed to escape the usual consequences of discrimination.

These complaint situations retain the essential feature that enforcement of accessibility rights is through the regulatory approach of adaptation planning while providing a remedy against recalcitrant respondents who refuse to implement a plan
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Despite penalties for failing to do so. In those circumstances, not only is there a need to penalize failure to meet the regulatory requirements, but there is also a need to take action to prevent repetitions of the discriminatory act. The imposition of an adaptation plan would be one potential remedy.

A final word should be said about the possibility of paralysing the enforcement system with claims of apprehension of bias if the commission which is involved in the setting of standards and the auditing of plans is the same body which investigates and adjudicates complaints. Human rights commissions are purely administrative agencies subject only to the rules of administrative fairness when making decisions. Any action taken by a commission is of an administrative nature. It is a board of inquiry which is the quasi-judicial decision making body. These boards of inquiry must already be sufficiently separate from the commission to avoid being tainted by apprehension of bias claims and this should be no different in the adaptation planning field.

D. Conclusions:

Accessibility rights are not being effectively enforced by human rights commissions or any other institution. If they are to be enforced more effectively in the future significant changes are required to clarify the exact meaning of these rights, to require related agencies to coordinate their efforts to avoid unnecessary duplication of effort and to ensure complementary actions are being taken simultaneously, and new implementation strategies must be introduced.


62. A possible anomaly is the British Columbia Council of Human Rights in which some members of the Council may decide to refer a complaint to another Council member to hold a hearing at which the complainant and the respondent present their cases. In this situation it is the same body which refers a complaint to a hearing and hears the complaint. Of course, it is possible to argue that this type of hearing is just a more formal administrative procedure but that strikes me as a very artificial argument.
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Once a legislature has decided to adopt a major public policy initiative, some agency must select from among the various policy options which could logically be chosen within the context of the general policy statement a set of operating principles to guide the policy refinement exercise which provides the details for daily administration. In Canada the legislatures have not set out the operating principles which would guide the administrators in implementing accessibility rights. In my view, it is the responsibility of the legislators to select these principles and include them in the human rights legislation.

There are three administrative stages in policy implementation. These are policy refinement, diffusion, and execution. The implementation of accessibility rights suffers from the lack of coordination among the various agencies which should be involved in each of these stages. The essential point of coordination is to ensure that accessibility rights issues become integrated into the systems which order and structure society.

I propose three additional implementation strategies which are designed to tackle the systemic nature of violations of accessibility rights. First, self-regulating professions must incorporate responsibility for the implementation of accessibility rights into their professional standards of conduct. This would maximize the chances of preventing accessibility problems at the earliest stages of planning new construction or new technologies. An additional consequence would be to change the assessment of the cost factor for the bffj defence by passing on at least some of the cost of remedying violations to the insurance programs of these professionals. This would be a powerful incentive to stop treating accessibility as a nuisance and an after thought.

Accessibility rights issues should be integrated into the systems which make up society. In keeping with this principle, the primary enforcement agencies should be those regulatory agencies which already exist to regulate particular industries. These agencies are very familiar with the details of the systems they regulate and can identify potential problems and take action without waiting for a person to file a complaint. The enabling legislation for these regulatory agencies should be amended to give them clear
responsibilities to implement accessibility rights, as was done with the *National Transportation Act*.

The complaint based implementation strategy of the human rights process has proven itself ill suited to the effective enforcement of accessibility rights. I propose that a major new initiative be undertaken. This is to add a regulatory enforcement strategy of adaptation planning to the human rights legislation. The primary benefit of this system is that it forces the issue of accessibility rights onto the corporate agenda. By requiring every service provider to undertake a review of its operations to identify barriers to access and to make a plan to eliminate those barriers, the implementation of accessibility rights can proceed in an orderly fashion and the various competing interests can be balanced. Adaptation planning is an ongoing activity which reacts to changes in the technological and economic environment.

Every service provider would be required to review their operations to identify barriers to access, make a plan for eliminating those barriers over time, and file a certificate of compliance with the human rights commission for their jurisdiction. There would be a penalty for the failure to do these things. The plans would be audited by the human rights commission. In circumstances where the service provider refused to prepare a plan, correct a deficient plan, or actually implement the plan the usual complaint process would be available to provide a remedy for discrimination caused by barriers to access.
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